

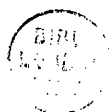
CONTEMPORARY PROBLEMS IN HINDU
RELIGIOUS ENDOWMENTS

by

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Thesis submitted for the degree of
Doctor of Philosophy
at the
University of London

School of Oriental
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Law Department,
1982



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ABSTRACT

The prime object of this thesis is to find out various problems of Hindu religious endowments in general, and private Hindu religious trusts in particular, and to provide suggestions which may be useful for any future comprehensive legislation in that field.

Though the thesis is on Hindu religious endowments, section 1 of the first chapter, providing a background to the main contention, deals with the provisions of the Constitution of India, which guarantees every individual in India the right to freedom of religion and management of religious affairs. The purpose of section 2 of the chapter is to show how far a Civil Court can intervene in religious affairs.

The second chapter deals with trusts in both English and Hindu law. The objects of this chapter are to enquire into those areas in which the influence of English concepts of law in the Indian field are evident and to make a brief comparative study between the two systems.

The main contention, which is related to various problems of private Hindu religious endowments or private debutters is expressed in the third, fourth and fifth chapters.

The sixth chapter deals with Hindu public religious trusts called maths; these are unique and one of the oldest Hindu religious institutions. Moreover, it is the problems existing in those institutions which have been investigated.

The seventh, and concluding chapter advances propositions relating to the contents of the thesis, in the hope that, if any future statute is introduced, the Indian Parliament will take into consideration the suggestions put forward by way of those propositions.

ACKNOWLEDGEMENTS

I wish first to acknowledge my deep gratitude to my supervisor, Professor J.D.M. Derrett, but for whose sincere guidance I would never have reached the stage of submitting this thesis.

My gratitude and thanks are especially due to the following, who have helped me in various ways during the preparation of my thesis: Dr. (Mrs.) H. Kanitkar for kindly sparing so much of her time for checking most of the manuscript and for her valuable comments; Mrs. Barbara Nelson-Smith for her superb typing and her very helpful suggestions; Professor N. Watase for assisting me in translating a sastric text, and Miss Zainab Ahmed for her invaluable comments from the beginning to the finish of my research. Thanks are due also to Mr. G. Sen and Mr. G. Griffith for their help.

It remains for me to thank the staff of the SOAS Library, particularly Miss Barbara Terriss, Mr. Dogra, Mr. C. Perkins and Mr. B. Scott, who made my research so much easier. My thanks are also due to the staff of the Institute of Advanced Legal Studies for their assistance in my research, while a special word of thanks is also due to Mrs. K. Henderson of the SOAS Registry for her kindness.

I am obliged to those individuals, too many to be mentioned by name, who helped me in my research.

Finally, no words can express my deep sense of gratitude to my wife, Suva, who (sacrificing all material comforts for so many years) stood by me and supported me generously in my academic pursuits.

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ABBREVIATIONS

AC	Appeal Cases
AIR	All India Reporter
All	Allahabad
All ER	All England Reports
ALJ	Allahabad Law Journal
AnWR	Andhra Weekly Reporter
AP	Andhra Pradesh
Beav	Beavan
BHCR	Bombay High Court Reports
BLR	Bengal Law Reports
Bom	Bombay
Bom.LR	Bombay Law Reporter
BORI	Bhandarkar Oriental Research Institute
BSOAS	Bulletin of the School of Oriental and African Studies
Cal	Calcutta
Ch. or Ch.D.	Chancery Division
CLJ	Calcutta Law Journal
CLR	Calcutta Law Reports
CWN	Calcutta Weekly Notes
Critique	A Critique of Modern Hindu Law
CLT	Cuttack Law Times
Del	Delhi
Dy	Dyer
ECMHL	Essays in Classical and Modern Hindu Law
ER	English Reports
FB	Full Bench
GLT	Gujarat Law Times
Guj	Gujarat
HL	House of Lords
Hyd	Hyderabad
IA	Law Reports - Indian Appeals series .
ICLQ	International and Comparative Law Quarterly
ILR	Indian Law Reports
IMHL	Introduction to Modern Hindu Law
ITR	Income Tax Reports
J & K	Jammu and Kashmir

JILI	Journal of the Indian Law Institute		
Jnl	Journal Section		
JRAS	Journal of the Royal Asiatic Society		
Ker	Kerala		
KLT	Kerala Law Times		
Knt	Karnataka		
Lah	Lahore		
Mad	Madras		
Mad H.C.R.	Madras High Court Reports	Ves	Vesey Junior
Madh Bha	Madhya Bharat	WR	Sutherland's Weekly Reporter
Man	Manipur		
MIA	Moore's Indian Appeals	ZVR	Zeitschrift für vergleichende Rechtswissenschaft
MLJ	Madras Law Journal		
MP	Madhya Pradesh		
MWN	Madras Weekly Notes		
Mys	Mysore		
Nag	Nagpur		
Nag LR	Nagpur Law Reports		
NOC	Notes of Cases		
NUC	Notes of Unreported Cases		
OJ-C	Original Jurisdiction, civil		
Ori	Orissa		
P & H	Punjab and Hariyana		
Pat	Patna		
PC	Privy Council		
P.R	Punjab Record		
Punj	Punjab		
QBD	Queen's Bench Division		
Raj	Rajasthan		
Rep	Reprint		
RLSI	Religion, Law and the State in India		
SC	Supreme Court		
SCC	Supreme Court Cases		
SCJ	Supreme Court Journal		
SCR	Supreme Court Reports		
SCWR	Supreme Court Weekly Reporter		
SDA	Sudder Dewanny Adawlut		
Sim & St	Simons and Stuart		
Tra-Co	Travancore-Cochin		
Tra-Co LJ	Travancore-Cochin Law Journal		
Trip	Tripura		

PREFACE

This thesis is an attempt to describe the laws relating to Hindu religious endowments in a particular way. Its prime aim is not simply to state the laws as they are but to evaluate them in the context of current problems of Hindu religious endowments in general and Hindu private religious endowments in particular. It is in the field of Hindu private religious endowments as in the case of Islamic wakfs, that we find endowments generally made principally for the benefit of the relations and descendants of the founder, and only nominally for religious and charitable purposes. Such practices are really devices to circumvent the law of succession and the revenue laws.

A brief discussion has been made in this thesis on the law of trusts, specially the trusts of a religious nature, as administered in England, to show only the English parallels with India.

In so far as my knowledge goes, this is the only supervised thesis on the subject of Hindu religious trusts. So far as Hindu laws regarding religious endowments are concerned, every author is obliged to such well known writers as Mukherjea, Varadachari and Iyer, but I have referred to Derrett's works extensively because of the author's treatment of the contemporary problems of Hindu religious endowments. Moreover, on many occasions in attempting to find a solution to a thorny problem, I have considered various suggestions put forward by Derrett in his different works dealing with Hindu religious endowments.

The thesis begins with a discussion on the Constitutional provisions, namely Arts. 25 and 26 of the Constitution of India, protecting different religions through their direct link with religious beliefs, practices and institutions, including Hindu religious institutions. Caste questions, being at many points religious questions, have been dealt with to show the present position of the law relating to the Court's unique and complex jurisdiction in religious matters.

I am very conscious of the difficulties involved in estimating the level of legal sophistication required in this kind of work which is addressed to readers who may be of so many different levels of intellectual attainment in various disciplines. The thesis is mainly based on judicial decisions, but on rare occasions I have had to include non-legal material which may be less familiar to lawyers. The inclusion of such material seems to be indispensable as a preliminary to a theory I have to offer relating to the development of a particular law.

Finally, one important point to be noted is that this thesis does not go into the now obsolete details of the question of the shebait's and mahants' proprietary right as formerly protected under Art. 19(1)(f) of the Constitution of India, but only touches on this matter where relevant. The amendment of the Article by the Forty-fourth Amendment in 1979 creates a great practical problem which, while it is deliberately excluded from the thesis because of its enormous implications over the whole field of law, offers me a valuable opportunity to point out certain avenues for attaining reforms, the need for which I hope to expound in what follows.

CHAPTER I

INTRODUCTION

SECTION 1. CONSTITUTIONAL PROTECTION OF RELIGION

a. Individual Freedom and Freedom of Religious Denominations

Articles 25 to 28 of the Constitution of India deal with the right to freedom of religion¹ but the fundamental rights, as guaranteed in Articles 25 and 26, form the principal basis of the legal independence of both individuals and associations of individuals, united by common beliefs and practices.² The formulation of clause (1) of Article 25 (below) providing guarantee for the freedom of religion to all persons including aliens³ seems to betray the influence of the Irish Constitution (1937).⁴ But clause (2) of Article 25 does not relate directly to religious practices; it is associated with secular activities such as economic and political ones.⁵ At this point because of their direct

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1. K.P. Dubey, A Critical Study of the Indian Constitution, 1st ed., Kitab Mahal, Allahabad, 1968, 40. See also D.D. Basu, Introduction to the Constitution of India, 6th ed., Prentice Hall of India, New Delhi, 1976, 98, where the learned author observes that "The attitude of impartiality towards all religions is secured by the Constitution by several provisions [Arts. 25-28]...."
 2. D.E. Smith, India as a Secular State, Princeton University Press, Princeton, New Jersey, 1963, 109: "Individual freedom of religion" is "basically guaranteed in article 25 ... collective freedom of religion is spelled out in article 26".
 3. Ratilal v. State of Bombay AIR 1954 SC 388, 391. See below, this section.
 4. V.P. Luthera, The Concept of the Secular State and India, Oxford University Press, Calcutta, 1964, 110.
 5. Clause (2) of Article 25 "constitutes in itself a revolution in the traditional conception of religion in India. It strips free religious practice of anything of a secular nature and authorises the State to go ahead with its wide programme of social and economic reform." C.H. Alexandrowicz, "The Secular State in India and in the United States", Journal of the Indian Law Institute, Vol. 12 (1959-60), 273-296, 284.

importance, Articles 25 and 26 may be reproduced¹ below for ease of reference.

Article 25 reads:

"(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.- The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.- In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right -

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law."²

The written protection as given in the Articles of freedom of religion was much needed in the context of India, especially to maintain communal harmony between Hindus and Muslims. Religion played a tragic part resulting in communal strife between Hindus and Muslims for many decades. By framing the Articles the framers of the Constitution have kept religion away from politics.³ The guarantee of freedom of religion as granted by the Constitution

1. Art. 27 forbids levy of taxes for the promotion or maintenance of any particular religion. Art. 28 prescribes *inter alia* that no religious instruction shall be provided in any state-maintained educational institutions. (See D.D. Basu, Shorter Constitution of India, 5th ed., S.C. Sarkar and Sons, Calcutta, 1967, 167; by the same author, Constitutional Law of India, New Delhi, 1978, 88-9.)

2. The Constitution of India, Commemorative Edition, Ministry of Law, New Delhi, 1973, 10.

3. K.P. Dubey, op.cit., 41.

to all persons, is also needed for their liberty, dignity and well-being.¹

The need for such a guarantee arises also,

"from the fact that the minority might well suffer from the thoughtless or perverse arrangements which the majority might think fit to enact as laws, and communal harmony is best achieved if each individual is not only free to practise his religion but is also (in P.K. Tripathi's appropriate way of putting it) free from the religions of his₂ fellow citizens, whether of his own, or another community".

So far as the right to freedom of religion of any individual is concerned, Art. 25 is the most important base of protection³ securing to him the freedom of conscience, the right freely to profess, practise and propagate religion (Art. 25(1)). But this freedom as guaranteed in the Article is not an absolute one; it is subject to restrictions which may be imposed by the State on grounds of (i) public order, morality and (ii) other provisions of Part III of the Constitution (Art. 25(1)); (iii) regulating non-religious activity associated with religious practice (Art. 25(2)(a)), and (iv) for providing social welfare and reforms⁴ or throwing open of Hindu public religious institutions to all sections of Hindus (Art. 25(2)(b)).

Art. 25 is concerned with the right of an individual⁵ to freedom of religion while Art. 26 provides for the right of every religious denomination or any of its sections⁶ to establish and maintain institutions for religious

-
1. P. Sarojini Reddy, Judicial Review of Fundamental Rights, National Publishing House, New Delhi, 1976, 165.
 2. J.D.M. Derrett, "Examples of Freedom of Religion in Modern India", Contributions to Asian Studies, Vol. 10, 1977, 42-51, 42.
 3. S.P. Sharma, "Freedom in Matters of Religion", in M. Imam (ed.), Minorities and the Law, Indian Law Institute Publication, N.M. Tripathi, Bombay, 1972, 263-277, 266.
 4. M.C. Setalvad, Secularism, Publication Division (Govt. of India), New Delhi, 1967, 21.
 5. The right is not confined to Indian citizens only. "Art. 25 of The Constitution guarantees to every person and not merely to the citizens of India the freedom of conscience and the right freely to profess practise and propagate religion". Per Mukherjea, J., Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388, 391.
 6. It was held that Art. 26 covered both religious denominations and their sections such as mutts or spiritual fraternity. See K.R. Naik v. State, AIR 1974 Knt.129.


and charitable purposes (Art. 26(a)). Every religious institution is entitled to manage its own affairs in matters of religion (Art. 26(b)) and to own and acquire movable and immovable property (Art. 26(c)). But such property is to be administered by the religious denomination¹ in accordance with law (Art. 26(d)). The right as conferred on a religious denomination under Art. 26 falls into two parts - the one dealing with religion and matters relating to it, and the other is concerned with matters which are not essentially religious and fall into the category of secular activities being subject to the ordinary laws of the land. Thus the State is empowered by law to control the administration and management of property owned by religious denominations. It was this power which led the states of Madras and Bombay to enact the statutes of the Madras Religious and Charitable Endowments Act, 1951 and the Bombay Public Trusts Act, 1950.²

Now, so far as the provisions of freedom of religion are concerned, there has been a difference of opinion regarding the question as to what matters constitute religious practices. The question was first dealt with by the Bombay High Court in State of Bombay v. Narasu Appa.³ In that case, the Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946) was impugned on the ground that it contravened Art. 25 of the Constitution. Rejecting the contention of the defendant that polygamy was an integral part of the

Hindu belief and religious practices. What the State protects is religious faith and belief.⁴ If religious practices run counter to public
 "A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief.⁴ If religious practices run counter to public

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1. The expression "denomination" includes denominations of all persons including those of aliens: S.K. Patro v. State of Bihar AIR 1959 Pat 394.
 2. J.M. Shelat, Secularism: Principles and Applications, N.M. Tripathi, Bombay, 1972, 100-101.
 3. AIR 1952 Bom 84.
 4. The case was followed and the principle was applied by the same Court in Sardar Syedna Taher Saifuddin v. Tyebbhaji Moosaji, AIR 1953 Bom 183. In that case the constitutional validity of the Bombay Prevention of Excommunications Act (42 of 1949) was challenged by the defendant on the grounds that it contravened Arts. 25 and 26, but the Court did not uphold that contention. The suit was filed by the plaintiff for a declaration that two excommunication orders passed by the Head Priest of the Dawoodi Bohra Community, the defendant, were void and illegal.

Chagls, C.J. followed the view held in Reynolds v. United States 98 145 (1879) (conviction of a Mormon for polygamy). Reynolds' case has been discussed elaborately by T. Kawai in Religious Provisions in Indian and American Constitutions, Ph.D thesis (unpublished), 1982. Professor Derrett has told me about this. The thesis is not seen by me, ^{because} it has not yet been catalogued either by the Senate or by the SOAS library, University of London.



order, morality or health or a policy of social welfare¹ upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."²

This is a point of view which could appeal to many observers versed in United States constitutional law, and can be described as "cosmopolitan".

The Madras High Court took the same line in Srinivasa Aiyar v. Saraswathi Ammal³ as the Bombay High Court did in the above case of Narasu Appa,⁴ where the Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949) was impugned on the ground that the Act was ultra vires, contravening Art. 25(1) of the Constitution. Rejecting that claim of the petitioners, the High Court held that

"The religious practice therefore may be controlled by legislation if the State thinks that in the interests of social welfare and reform it is necessary to do so."⁵

In another bigamy case (Ram Prasad v. State of U.P.)⁶ the petitioner, a state Government engineer, who had married in 1934, had not any surviving male child, and wanted to marry again. At the instigation of his (the petitioner's) wife, the Chief Engineer refused to give him permission to remarry without the permission of the Uttar Pradesh Government. He petitioned for a writ of mandamus commanding the State of U.P. to dispose of his two applications in accordance with the Sastra and contended that Rule 27 of the U.P. Government Servants Conduct Rules, which provided that a Government Servant could not marry a second wife, was violative of the fundamental right guaranteed under Art. 25 of the Constitution. The High

1. The same view has been expressed in a different language and in a different context by Gajendragadkar when he says that "Though the Constitution guarantees freedom to all religions, it recognizes that in certain aspects, and under certain conditions, religious practices may infringe upon socio-economic problems and the Constitution has made it clear that whenever socio-economic problems or relations are involved, the State will have a right to interfere in the interests of public good." P.B. Gajendragadkar "Secularism: Its Implications for Law and Life in India" in G.S. Sharma (ed.) Secularism: Its Implications for Law and Life in India, N.M. Tripathi, Bombay, 1966, 1-8, 4-5.

2. AIR 1952 Bom 84, 86.)

3. AIR 1952 Mad 193.

4. AIR 1952 Bom 84.

5. AIR 1952 Mad 193, 196.

6. AIR 1957 All 411.

Court of Allahabad did not uphold the contention of the petitioner.

Mehrotra, J. observed for the Court that

"I have come to the conclusion that the act of performing a second marriage in the presence of the first wife cannot be regarded as an integral part of the Hindu religion, nor can it be regarded as practising or propagating the Hindu religion which is protected under Art. 25 of the Constitution. Even if bigamy be regarded as an integral part of the Hindu religion the impugned rule is protected under Art. 25(b) of the Constitution."¹

Thus the

"courts can discard as non essential anything which is not proved to their satisfaction ... to be essential, with the result that it would have no constitutional protection. The Constitution does not say 'freely to profess, practise and propagate the essentials of religion,' but this is how it is construed."²

Moreover, the expressions 'social welfare and reform' in Art. 25(2)(b) of the Constitution could evidently be used as an instrument for attacking any profession or propagation of any religion³ and we have seen the use of that instrument by both the Bombay and Madras High Courts in the bigamy cases as mentioned above.

But this narrow 'cosmopolitan' interpretation of 'religion' confining it in effect to religious beliefs, was not accepted by the Supreme Court of India. The judgement of the Supreme Court in Commissioner of Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar, Shirur,⁴ in which Arts. 25 and 26 were relied on to invalidate certain provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951, marked a radical departure from the view of religion as held by the Bombay High Court. In

1. AIR 1957 All 411, 414.

2. J.D.M. Derrett, Religion, Law and the State in India (hereafter referred to as RLSI), Faber and Faber, London, 1968, 447.

3. Ibid., pp. 444-445; see also Luther, op.cit., 113, where, referring to the limitation clause 1 of Art. 25, he says that "the provision, as it stands, does vest authority in the state which empowers it to invade the realms of conscience of the individual on the grounds mentioned above."

4. AIR 1954 SC 282. The Shirur Math Case. 'Math' has an alternative spelling, 'mutt'.

that case, the Mathadipathi of the Shirur Math¹ alleged that several provisions of the said Madras Act and action taken against him thereunder infringed some of his fundamental rights and those provisions were, as a result, void and unconstitutional. Mukherjea, J. as he then was, delivering the judgement for the Supreme Court, observed that

"The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression 'practice of religion' in Art. 25."²

The learned Judge was greatly influenced in his view by a decision of the High Court of Australia and he observed that

"Latham, C.J. of the High Court of Australia while dealing with the provision of S. 116, Australian Constitution which 'inter alia' forbids the Commonwealth to prohibit the 'free exercise of any religion' made the following weighty observation - vide Adelaide Company v. The Commonwealth, 67 CLR 116 at P. 127 (H):

"It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious 'opinions', it nevertheless may deal as it pleases with any 'acts' which are done in pursuance of religious beliefs without infringing with the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of S. 116. The section refers in express terms to the exercise of religion and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. It also protects acts done in pursuance of religious belief as part of religion."³

Although the Indian Supreme Court quoted an important Australian decision, it must not be supposed that the concept was and is not thoroughly consistent with Indian ideas and Indian needs. A 'cosmopolitan' definition of 'religion' would ignore many facets of Indian (not merely Hindu) type as we shall see.

Again the Supreme Court dealt with the administrative aspect of a religious denomination and held that so far as the administration of property

1. The same math figured later on in S.T. Swamiar v. Commissioner for Hindu Religious and Charitable Endowments, Mysore (AIR 1963 SC 966). In that case, the petitioners challenged the validity of Section 51(1)(f) of Madras Hindu Religious Endowments Act (19 of 1951) unsuccessfully. The aforesaid sub-section empowered the Commissioner to remove a trustee of a math for several reasons, as stated in the sub-section.

2. AIR 1954 SC 280, 290.

3. Ibid., p. 290.

belonging to a religious denomination was concerned, the right of a denomination to administer such property was a fundamental right guaranteed under Art. 26(d) of the Constitution but that right was subject to such regulations and restrictions as imposed by law. Thus the learned Judge ruled that

"It should be noticed however that under Art. 26(d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose.

"A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right¹ guaranteed under cl. (d) of Art. 26."²

Now Section 21 of the Madras Hindu Religious and Charitable Endowments Act, 1951 empowered the Commissioner and some persons to enter the premises of any religious institution to discharge their duties or to exercise their powers under the Act. That section was the only one which was struck down under Art. 25 as it did not provide any safeguards regarding the parts of the premises, ceremonies of a religious institution, etc. In this context the Court held that

"It is well known that there could be no such thing as an unregulated and unrestricted right of entry in a public temple or other religious institutions for persons who are not connected with the spiritual functions thereof. We think that as the section stands, it interferes

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1. The principle was applied in many cases. It was reiterated by the same learned Judge in Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388 which we will be discussing later in the present section. The case of Ratilal was followed and the principle was applied in Krishnan v. Guruvayoor Devashom, 1979 KLT 350 (FB) which has been discussed below.

The principle was also discussed in The State of MP v. Mahant Kamal Puri, AIR 1965 MP 183 which was related to the administration of the temple of Kali Mata at Basaiya, and the issue was the interpretation of a certain section of the Gwalior State Places of Worship and Religious Endowments Aid and Administration Act (Gwalior Act) (Samvat 1983). The High Court ruled that the language in the section was meant for "restoring proper management of a place of worship and its property for fulfilling the objects of the founder." (Per Pandey, J. at 185).

2. AIR 1954 SC 282, 291.

with the fundamental rights¹ of the Mathadipathi and the denomination of which he is head guaranteed under Arts. 25 and 26 of the Constitution."²

Referring to section 56 which empowered the Commissioner to call upon the trustees to appoint a manager to administer the secular affairs of the institution and in case of default, the Commissioner himself could make such an appointment, the Court held that

"the effect of the section really is that the Commissioner is at liberty at any moment he chooses to deprive the Mahant of his right to administer the trust property even if there is no negligence or maladministration on his part. Such restriction would be opposed to the provision of Art. 26(d) of the Constitution. It would cripple his authority as Mahant altogether and reduce his position to that of an ordinary priest or paid servant."³

Again, rejecting the view of 'religion' as held by the Bombay High Court following the rigid definition of religion as given in an American case, (vide Davis v. Beason (1888) 133 US 333 at P.342), the Supreme Court gave its own definition of religion when it held that

"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not

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1. But the violation of rights of an individual as guaranteed under Art. 25 by another individual is not within the scope of Art. 25. What is provided in the Article is express prohibition of the legislative interference with these rights. See Ushaben v. Bhagyalaxmi Chitra Mandir, AIR 1978 Guj 13. The case was concerned with exhibiting a picture called "Jai Santoshi Maa". In that case, the High Court of Gujarat referred to the Supreme Court case of P.D. Shamadasani v. Central Bank of India, AIR 1952 SC 59, which ruled that Arts. 19 and 31 of the Constitution are not meant for protection of violation of rights by an individual. The Gujarat High Court seemed to extend the ruling of the Supreme Court for applying it in the case of Art. 25 as well.
 2. Per Mukherjea, J. AIR 1954 SC 282, 292.
 3. Ibid., pp. 293-294. A more or less similar argument was applied in the facts of Narayan Pershad v. State of Hyderabad, AIR 1955 Hyd. 82, 86 in which the Hyderabad Endowments Regulation (135 8 H.) was impugned. Referring to the decision in the present case, Ansari, J. observed that "The decision appears to me to be sound on principle for if under Art. 26(d) a State is to take away the right to administer the property there is no substance in allowing the denomination to own and acquire property. Then by allowing administration according to the law, the intention is that it must be by the persons entitled to it under the trust and not by the State on their behalf".

believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code or ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of religion."²

The Supreme Court also considered the question whether a mahant had a proprietary right as then guaranteed under Art. 19(1)(f)³ of the Constitution and held that "the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office."⁴

Thus the judgement of the Supreme Court in the Shirur Math case⁵ indicated the mahants' right of property and the right of a religious denomination to manage its own affairs.

"This was a step that might have been more carefully considered in view of the attitude adopted later by witnesses before the Hindu Religious Endowments Commission, namely that in fact the mahant's interests were often adverse to the community or 'denomination' which he was supposed to serve."⁶

No doubt, the decision in the present case was a pioneer one involving important deliberations on different issues relating to both Arts. 25 and 26. But the learned Judge seemed to have overlooked some vital provisions of both these two Articles. Thus Tripathi observes that

"For instance, in the course of the entire discussion while the Court had several occasions to mention "public order" "health" and "morality" as the overriding interests qualifying the right in Art. 25 the important reservation couched in the words "and to the other provisions of this Part" never seems to have been

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1. Even offerings of food are matters of religion as held in S.A. Srinivasmurthy v. Commr C. & H.R.I. & E, AIR 1973 AP 325; see also Acharaj Singh v. State of Bihar AIR 1967 Pat 114.
 2. AIR 1954 SC 282, 290.
 3. The provision under Art. 19(1)(f) which used to provide that every citizen had a fundamental right "to acquire, hold and dispose of property" is no longer in force due to the introduction of the Constitution (Forty-Fourth Amendment) Act, 1978, in 1979.
 4. AIR 1954 SC 282, 288.
 5. AIR 1954 SC 282.
 6. Derrett, RLSI, 495-496.

noticed by the Court. Not at one place does this reservation seem to have been mentioned in the entire judgment. To furnish another example of similar oversight, the following observations regarding the relative significance of the rights in clause (b) of article 26, on the one hand and of those in clause (c) and (d) of the same article on the other may be noticed:

'It will be seen that besides the right to manage its own affairs in matters of religion, which is given by cl. (b) the next two clauses of Art. 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that the equations merely relating to administration of property belonging to a religious group or institutions are not matters of religion to which cl. (b) of the Article applies.'

"The words the "latter is a fundamental right which no legislature can take away" seem to ignore the opening words of article 26 which subject this right, as indeed all others in the article, to "public order, morality and health."

But if the aforesaid observations of Mukherjea, J. would have included the words "Subject to public order, morality and health", would it make any difference so far as the principle as laid down in the observations was concerned? In my opinion in the context of the management of a religious denomination's own affairs in matters of religion, the ruling would have been the same as above, whether or not the opening words of Art. 26 were taken into account by any Court.

In Ratilal Panachand Gandhi v. State of Bombay,² the Supreme Court setting aside the order of the Bombay High Court, adopted the same reasoning as in Commissioner of Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar, Shirur,³ popularly known as the Shirur Math case,⁴ and

1. P.K. Tripathi, Spotlights on Constitutional Interpretation, N.M. Tripathi, Bombay, 1973, 113.

2. AIR 1954 SC 388.

3. AIR 1954 SC 282.

4. In Sri Jagannath Rammanuj v. State of Orissa, AIR 1954 SC 400, the petitioners challenged the Orissa Hindu Religious Endowments Act (4 of 1939) on constitutional grounds. In that case the grounds upon which the validity of the Orissa act was challenged were substantially the same as were urged in challenging the constitutionality of the Madras Hindu Religious and Charitable Endowments Act, 1951 in the Shirur Math case (AIR 1954 SC 282). The Supreme Court held that secs. 38, 39 and the provision of sec. 46 were invalid, but the rest of the Act was valid.

the case was decided in the same year as the Shirur Math case. In that case, the petitioners challenged the constitutional validity of the Bombay Public Trusts Act, 1950 (Act 29 of 1950) passed by the Bombay Legislature to regulate and make better provisions for the administration of the public and religious trusts in the State of Bombay. The Act was assailed on the ground that it was in conflict with the freedom of religion and the right of a religious denomination or its sects to manage their own affairs in matters of religion guaranteed under Arts. 25 and 26 of the Constitution. In that case, the Bombay High Court adopted a negative approach towards freedom of religion as guaranteed by the Constitution of India. But when the case was before the Supreme Court, it had a "much wider view of the fundamental right and a more realistic, as well as more traditionally Indian view of what religion is and how its nature and content should be determined."¹ Thus Mukherjea, J. as he then was, observed again for the Supreme Court that

"subject to the restrictions which this Article² imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people.

"What sub. cl. (a) of cl. (2) of Article 25 contemplates is not State regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices.

"In regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand as regards administration of property which a religious denomination is entitled to own and

1. Derrett, RLSI, 463.

2. The Article which was referred to there was Art. 25.

acquire, it has undoubtedly the right¹ to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted, but here again it should be remembered that under Art. 26(d), it is the religious denomination itself which has been given the right to administer its property in accordance with any law which the State may validly impose."²

Thus the Supreme Court, rejecting the narrow view of religion taken by the Bombay High Court, demonstrated clearly the boundaries within which the religious rights of individuals and those of denominations as also the legislative interference in the management of properties belonging to such denominations, could affect each other.³

In Sri Venkataramana Devaru v. State of Mysore⁴ the appellants challenged the validity of the Madras Temple Entry Authorization Act, 1947, on the ground that the Sri Venkataramana temple at Moolky Petah was not a public

1. In Sangli Municipality v. Sheshappa Bala, AIR 1971 Bom 99, the local authority wanted to construct a road through a burial ground used by the Lingayat Community. It was held that in the absence of law made under Art. 252, the rights of a community based upon well established usage governing burial grounds, could not be encroached upon. But in more or less similar circumstances, the Allahabad High Court did not accept the arguments of the petitioner in Mohd. Ali Khan v. Lucknow Municipality AIR 1978 All 280, that the land on which a mosque stood and where a grave existed could not be the subject matter of acquisition in view of Arts. 25 and 26. But the right to property of an individual professing a particular religion is not a religious right as held by the Bombay High Court in Wasudo v. State, AIR 1976 Bom 94. In that case the appellant challenged the constitutional validity of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961). But as against the contention of the appellant that the Act was violative of Art. 25 of the Constitution, (at p.105) Masodkar, J. ruled that "Only because a person happens to be propagating or following a particular religion, it can not be said that his right to property is also a religious right."
2. AIR 1954 SC 388, 391-392.
3. But in K.W. Estates v. State of Madras, AIR 1971 SC 161, the Supreme Court ruled that the Madras Legislature by providing in some Acts (for example, the Madras Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963) for acquisition of properties belonging to religious denominations had not contravened Art. 26 of the Constitution. The "denominations can own, acquire properties and administer them in accordance with law. That does not mean that the property owned by them cannot be acquired...Article 26 does not interfere with the right of the State to acquire property". - per Hegde, J. at 165. The same view has been reiterated by the Supreme Court in its recent decision in Mahant Ram Kishan Dass v. State of Punjab, AIR 1981 SC 1576, 1576-1577.
4. AIR 1958 SC 255.

temple. It was also contended that if the said temple was a public temple, the Act was ultra vires in so far as it authorised Hindus of all sections to enter it freely thereby infringing the rights of the denomination (Gowda Saraswath Brahmins) or the community guaranteed under Art. 25(b) providing a denomination's right to manage its own affairs in matters of religion. In short, the main question for decision was whether the right of a religious denomination to manage its own affairs in matters of religion, protected under Art. 26(b), was subject to the Madras Temple Entry Authorization Act, 1947, a law protected by Art. 25(2)(b) of the Constitution, throwing open a Hindu public temple to all sections of Hindus.¹ The Supreme Court solved the issue by holding that the right guaranteed under Art. 25(2)(b) is conferred on all classes and sections of Hindus

"to enter into a public temple and on the unqualified terms of that Art., that right must be available, whether it is sought to be exercised against an individual under Art. 25(1) or against a denomination under Art. 25(b). The fact is that though Art. 25(1) deals with the rights of individuals, Art. 25(2) is much wider in its contents and has reference to the rights of communities, and controls both Art. 25(1) and Art. 26(b)."²

Again, in that case, the Supreme Court could not be moved by the appellant's argument that the conflict between the rights under Art. 25(b) and Art. 25(2)(b) could be avoided if a religious institution of a public character would have been understood as meaning an institution dedicated to the Hindu community in general, but some sections of the community could be banned by custom from entering into it. The contention of the appellants was based

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1. The right of entry to any public temple is meant for Hindus only. Thus in Kalyan Dass v. State of Tamil Nadu, AIR 1973 Mad 264, the petitioner challenged the validity of Rule 4-A framed under the power given to the Government under the Tamil Nadu Temple Entry Authorization Act (Act 5 of 1947) allowing non-Hindus to enter Hindu Temples if the High Court held it as ultra vires. Rao, J. observed that "Prior to these enactments a social evil pervaded the Hindu community which excluded certain classes of Hindus from enjoying certain privileges which included the rights of entry of such depressed classes into the temple. This ban was removed by legislation. But it is to be noted that the ban was lifted in so far as it affected a part of the Hindu community and not non-Hindus." AIR 1973 Mad 264, 267.
 2. Per Venkatarama Aiyar, J., AIR 1958 SC 255, 268.

on two cases¹ of the Madras High Court, and in one of the cases (the case of Venkatachalapathi²) the Court had approved the rule of the Agamas that a temple was meant for all castes subject to some restrictions, viz. that Sudras and Baniyas could go into the hall of the temple. Pariahs could not go even into the court of the temple, but the Brahmins could go into the holy of holies. The Agamas contain the rules relating to the installation of images, construction of temples, conduct of worship, etc. The Supreme Court ruled that the purpose of the Madras Act was to remove disabilities to which some sections of Hindus were subject by custom and usage in respect of the entry into, and offering worship in, Hindu temples but it offered an

"intelligent compromise, whereby all the religious objections of the community appeared to be preserved, while at the same time the benefit accorded to Harijans, and to others who though not Harijans would have been excluded because they were not members of the community, appeared not to have been diminished - for Temple Entry remained valid, save that the trustees and priests could exclude from the more sacred parts of the temple any one they chose during times when the idol was supposed to be resting or at times when those services were being conducted which only specially initiated persons were entitled to attend."³

But the fact is that in not accepting the Agamas, the Supreme Court has ignored the right of some sections of Hindus based on Hinduism (as the Agamas is part and parcel of Hinduism) to exclude others from entering a temple. It seems that the whole exercise of the Court was to find social equity and justice which were denied to the Harijans. In Shastri Yagnapurushdasji v. Muldas,⁴ popularly known as the Satsang case, sec. 3 of the Bombay Hindu Places of Public Worship (Entry Authorization) Act (31 of 1956) was challenged on the ground that it was violative of Art. 26(b) of the Constitution. Gajendragadkar, C.J., who spoke for the Supreme Court,

1. Venkatachalapathi v. Subbarayadu ILR (1890) 13 Mad 293 and Gopala Muppanar v. Subramania (1914) 27 MLJ 253.

2. Ibid.

3. Derrett, RLSI, 468-469.

4. AIR 1966 SC 1119.

pointed out that

"We do not think that by enacting S3, the Bombay Legislature intended to invade the traditional and conventional manner in which the act of actual worship of the deity is allowed to be performed only by the authorised poojaris of the temple... all that S3 purports to do is to give the Harijans the same right to enter the temple, to worship in the temple, to pray in it or to perform any religious service therein which has been conferred by S3 is specially qualified by the Clause that the said right will be enjoyed in the like manner and to the like extent as any other Hindu of whatsoever section or class may do. The main object of the section is to establish complete social equality between all sections of the Hindus in the matter of worship specified by S3;"¹

Thus, the Supreme Court acted as a reformer of Hinduism in so far as it granted the right of entry to the Harijans into the temple thereby allowing them to participate on the same footing as other caste Hindus who were allowed to enter into a temple² freely but not authorised to perform the act of actual worship. It is submitted that the judgement is sound according to both the spirit and the letter of Art. 25(2)(b) of the Constitution. It seems that in the present case, the Supreme Court unlike the case of Sri Venkataramana Devaru,³ did not hand over a compromise formula between the rule of Agamas and the claim of the Harijans.

In Sardar Sarup Singh v. State of Punjab⁴ the petitioners challenged the constitutional validity of the Punjab Sikh Gurdwaras Act, 1925, on the ground that it violated their fundamental right conferred on them under Art. 26(b)

1. AIR 1966 SC 1119, 1127.

2. The case of Nar Hari Shastri v. Shri Badrinath Temple Committee, AIR 1952 SC 245, was concerned not with the right of Harijans but with the right of entry of pandas into the Badrinath Temple along with their yajmans or clients. The pandas were Brahmins, and there was no constitutional question relating to Arts. 25 and 26 involved in the case, and the court held that the pandas had a legal right of entry into the temple but with some restrictions which the committee might impose in good faith for maintaining the order and decorum of the temple.

3. AIR 1958 SC 255.

4. AIR 1959 SC 860.

of the Constitution by preventing direct election of officers to manage Sikh Gurdwaras on a universal denominational suffrage. It was held by the Supreme Court that the method of representation to the board to manage a Sikh Gurdwara was not a matter of religion. The Court observed obiter that "under article 26(b) a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion they hold."¹ As we shall see it is not clear whether the implications of this apparently reasonable statement were fully understood at the time. The Court emphasised the word 'essential' and in fact, it had laid down the same principles in the present case as it had done before eg. in the Shirur Math Case² and in the case of Shri Venkataramana Devaru,³ popularly known as Devaru's case.

In Moti Das v. S.P. Shahi,⁴ the appellants challenged the constitutionality of certain provisions of the Bihar Hindu Religious Trusts Act (1 of 1951). They submitted that the power given to the Board by the Act to alter or modify the budget of a religious trust affected adversely the due observance of religious properties in a temple and thus constituted an encroachment on the freedom of religion guaranteed under Art. 25 of the Constitution. Rejecting this contention of the appellants, Das, J. held that

"the provisions of the Act seek to implement the purposes for which the trust was created and prevent mismanagement and waste by trustees. In other words, by its several provisions, it seeks to fulfil rather than defeat the trust."⁵

1. Per Das, J., AIR 1959 SC 860, 865.

2. AIR 1954 SC 282.

3. AIR 1958 SC 255.

4. AIR 1959 SC 942.

5. Ibid., p.950. The present case should not be mixed up with another case namely, Ram Saroop Dasji v. S.P. Shahi, AIR 1959 SC 951. Though in that case too the Bihar Hindu Religious Trusts Act 1950 was assailed, unlike the present case, it was not challenged on the ground that it violated the fundamental right as guaranteed under Arts. 25 and 26. The real controversy of the case centred round the issue whether the Board could call upon the appellant to file a statement of income and expenditure of the properties belonging to the temple at Salonna as alleged to be private properties by the appellant.

Similarly in Sri Kanyakaparameswari Anna Satram Committee v. The Commissioner, Hindu Religious and Charitable Endowments¹ the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966) was challenged on the ground that it infringed the right of the denominational institution of the first plaintiff as guaranteed under Art. 26, but the High Court ruled that

"In this case, by the appointment of the Executive Officer, there is no interference with the constitution of the Governing Body. But the Executive Officer is appointed for better management of the Institution."²

In Durgah Committee, Ajmer v. Hussain Ali,³ the applicants challenged the Durgah Khawaja Saheb Act, 1955, which was concerned with the administration of the trust related to 'the durgah' (tomb) of Khawaja Moinuddin Chisti, situated at Ajmer, to which both Hindus and Muslims made offerings and of which sometimes Hindus had been administrators, on the ground that it violated several constitutional provisions affecting the freedom of religion guaranteed under Art. 26(b), (c) and (d) of the Constitution. Rejecting the contention of the respondents, Gajendragadkar, J. speaking for the Supreme Court, held the same view as expressed earlier in the Shirur Math case and in Devaru's case that according to Art. 26(b) matters of religion included practices which were regarded by the particular community as integral parts of religion. Moreover, the learned judge sounded a note of caution when he added that

"Whilst we are dealing with this part it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion, are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless

1. AIR 1979 AP 121.

2. Ibid., p. 125.

3. AIR 1961 SC 1402.

such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are essential and an integral part of it and no other."¹

Referring to the said important 'note of caution' uttered by Gajendragadkar, J., Tripathi observed that "The learned Judge ... was clear in his opinion that the doctrine of autogenesis of denominational powers laid down by the Court in the Swamiar² and Devaru cases needed severely to be restricted if not rejected."³

The aforesaid "note of caution" had been accepted by the Supreme Court at large, as has been pointed out by Derrett⁴ and quoted by Sinha, C.J., in his dissenting judgement in Sardar Syedna Taher Saifuddin Saheb v. State of Bombay,⁵ also known as the "Excommunication case".⁶ In that case, the Bombay Prevention of Excommunication Act, 1949, was impugned on the ground that the provisions of the Act infringed Arts. 25 and 26 of the

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1. Ibid., p.1415. In this context Ghouse points out that "There is nothing new in what Justice Gajendragadkar suggested. The dictum in Lakshmindra (AIR 1954 SC 282) that the essentialness of a religious practice should be determined with reference to the doctrines of the religion itself implied that this could be done on the basis of adduced evidence." M. Ghouse, Secularism, Society and Law in India, Vikas Publishing House, Delhi, 1973, 132. Here I cannot agree. On the contrary what is said develops unwarrantably and obiter what at best can be said to be latent in what was known before.
 2. By this the learned author means Commissioner of Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar, Shirur, AIR 1954 SC 282.
 3. P.K. Tripathi, op.cit., 117.
 4. Derrett, RLSI, 478.
 5. AIR 1963 SC 853. The case was referred to and the position of law relating to Arts. 25 and 26 as had been summarised in the case has been approved of in E.R.J. Swami v. State of Tamil Nadu, AIR 1972 SC 1586, 1593. In that case, the petitioners, the hereditary archaks and mathadipatis of some ancient Hindu public temples in Madras, claimed that the Tamil Nadu Hindu Religious and Charitable Endowments (Amendment) Act, 1970 infringed their freedom of religion secured to them by Art. 25 and 26 of the Constitution. But their claim was not upheld by the Supreme Court.
 6. "The modern, somewhat vague, urge towards liberty to hold any or no opinions at pleasure is thus confronted by the traditional and ancient institution of excommunication, a sanction which can be imposed for delinquencies of many sorts, not confined to matters of personal conscience, and which may, in Asia, have terrible results for those who cannot escape into a new faith or new society" - Derrett in his critique on the judgement in the Supreme Court case in "Freedom of Religion under the Indian Constitution: Excommunication (based on Sardar S.T.Saifuddin v.State of Bombay)", (1963)12 ICLQ 693-697, 694-695.

Constitution. The main claim of the petitioner, the head priest of the Dawoodi Bohra community, was that section 3 of the Bombay Act violated the right of his community and his right as the Dai, the head priest of that community, to manage its own affairs in matters of religion as embodied in Art. 26(b) of the Constitution. Accepting the argument of the petitioner and reversing the decision of the Bombay High Court which followed the judgement in State of Bombay v. Narasu Appa Mali,¹ the Supreme Court held that

"what appears however to be clear is that where an excommunication itself is based on religious grounds such a lapse from the orthodox religious creed or doctrine (similar to what is considered heresy, apostasy or schism under the Canon Law) or breach of some practice considered as an essential part of the religion by the Dawoodi Bohrahs in general excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community through its religious head, of its own affairs in matters of religion."²

In the context of the judgement in the Supreme Court case Derrett comments:

"At this stage it might be argued that provided the parties plead and prove that the practice is essentially religious the Courts will protect it to the extent that the constitutional guarantee is not qualified by the well known formulae, 'subject to public order, morality and health, economic, financial ... activity', 'social welfare and reform', 'throwing open of Hindu religious institutions'"³

But the ruling of the Court has subjected an individual's freedom of conscience and his right to profess, practise and propagate freely to the rights of the community or the denomination, and the legislature intended to diminish those rights by way of reform. It is submitted that if Art. 25(2)(b) "providing social welfare and reform" is a paramount clause controlling Art. 26 as ruled in Devaru's case,⁴ as was pointed out

1. AIR 1952 Bom 84. See below, this section.

2. Per Das Gupta, J. AIR 1962 SC 853, 869. But "The decision was widely disapproved by constitutional lawyers, on the grounds that it would encourage capricious and retrograde acts by religious leaders, masking conservative and even vengeful policies behind a facade of religion" - Derrett, RLSI,

3. Derrett, ibid., p. 477. 4. AIR 1958 SC 255, 256.

475, footnote 2.

by the Attorney General in this case also, then the majority decision of the Court should not have been as it has been. In short, Art. 25(2)(b) has been subjected to Art. 26 by the decision in the present case thereby contradicting the Court's own ruling on the supremacy of Art. 25(2)(b) over Art. 26 in Devaru's case.¹ Moreover, there is much force in Sinha, C.J.'s observation dissenting that "though the Act may have its repercussions on the religious aspect of excommunication, in so far as it protects the civil rights of the members of the community it has not gone beyond the provisions of Art. 25(2)(b) of the Constitution".²

Unfortunately, in most of the States, excommunication as the weapon of community or caste discipline is still in vogue and valid³ "except for the prohibition of the practice of untouchability".⁴

In Tilkayat Shri Govindlalji v. State of Rajasthan,⁵ a case of great significance for our thesis, the Goswami or the spiritual head of the Nathdwara temple and certain persons representing the Vaishnavas of the Vallabha cult, for whose benefit the temple was founded, challenged the constitutionality of the Rajasthan Nathdwara Temple Act, 1959. The Act

1. AIR 1958 SC 255, 256.

2. AIR 1962 SC 853, 865.

3. S. Varadiah Chetty v. P. Parthararathy Chetty (1964) 2 M.L.J. 433. In that case, the main question for decision of the High Court was how far a decision of a sub-sect of a caste to impose social segregation to its ex-Headman could be held valid. The Court upheld the alleged resolution of the community taken through its panchayat which amounted to excommunication of its former Headman.

Manna v. Ram Ghulam AIR 1950 All 619; Ellappa v. Ellappa AIR 1950 Mad 409; Panduram v. Biswambar AIR 1958 Ori 259: In all these cases, excommunication had been held valid. Realistic assessment of the Indian society had been made by Narasimham, C.J. when he observed in the case of Panduram AIR 1958 Ori 259, 259 that "It is true that the Constitution does not recognise caste but social customs have not changed notwithstanding the provisions of the Constitution...."

4. Derrett, RLSI, 473.

5. AIR 1963 SC 1638.

vested the right to possession and management of the properties in a statutory Board and the Goswami was to be a member of the Board. He could be removed like other members by the State Government in accordance with the provisions of the Act, and section 16 of the Act transferred some important religious functions from the Goswami to the Board. Reversing the decision of the High Court, the Supreme Court upheld the provisions of the Act, and in arriving at its decision it relied upon a "Firman" (order) issued by the Maharana of Udaipur in 1934 to establish that the Tilkayat was merely a temporary custodian or a manager or a trustee of the property of the deity, and the Udaipur Darbar (i.e. the state) had the absolute right to see that the said property was used for legitimate purposes. Moreover, by relying on the said 'firman' the Court also wanted to establish that the law of Udaipur was that the succession to the "Gaddi" (seat) of the Tilkayat was governed by the rule of primogeniture (i.e. the right of succession belonging to the first-born) and that "the Udaipur darbar has the absolute right to depose any Tilkayat maharaj for the time being if in its absolute discretion such Maharaj is considered unfit...."¹

It has been pointed out by Tripathi that the Tilkayat and his denomination have been denied constitutional guarantees because of the fact that the Court has imported here the restrictions and denials perpetrated by autocratic rulers during the pre-Constitution era:

"What the Udaipur Darbar did in the wilful exercise of his uncontrolled and unguided power need not be consecrated as the Hindu concept of a Mahant's powers in relation to his Gaddi or in regard to the management of the religious and secular affairs of his institution."²

1. AIR 1963 SC 1638, 1650.

2. Tripathi, op.cit., 121. However, what Tripathi omits to notice is that the Tilkayat's claims were never satisfactorily proved and that they could rely upon a constitutional guarantee remained and remains a mere hypothesis. He is, however, with respect, right in commenting on the Supreme Court's eagerness to take advantage of the one piece of evidence that served to buttress the state's power in the interest not of the Tilkayat but of the institution (on which he was parasitic).

Again, apart from the observances on different issues as involved in the case, we are also aware of the consciousness of the Court regarding these heads of religious sects and their supporters that they really were under the impression that their status and powers were a matter of religion.

"There cannot be any doubt (we may interject) that the worshippers of the idol or idols really believe that by making donations which reach the Tilkayat's, or a similarly placed individual's pocket, some spiritual benefit accrues to them, and his willingness to receive these donations, whether on God's behalf or his own, is a condescension from which they derive religious satisfaction."¹

Another case originating from Udaipur came before the Supreme Court. Thus in State of Rajasthan v. Sajjanlal,² the petitioners complained that the temple of Sri Rikhebdevji, a Swetambar Jain temple, had been illegally taken over by the Devasthan Department of the State of Rajasthan, and they challenged the validity of certain provisions of the Rajasthan Public Trusts Act, 1959 on the ground that they contravened the provisions of Arts. 25 and 26 of the Constitution. But like the case of Tilkayat Shri Govindlalji,³ the Court upheld the firmans or rulings of the pre-Constitution period as valid. It was the finding of the Court that the management of the temple in question had been taken over by the Ruler of Udaipur State and it virtually vested in the State through the Constitution.

It is true that in many cases of religious denominations, legislative interference has been held to be violative of constitutional provisions, but in some cases where a state's interference has been urgently needed for the better administration of properties belonging to religious denominations,⁴ where the State is in duty bound to look after properties

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1. Derrett, RLSI, 479. 2. AIR 1975 SC 706. 3. AIR 1963 SC 1638.
4. In a major study of administrative machinery relating to temples and maths in Madras State as established by the Madras Hindu Religious and Charitable Endowments Act (19 of 1951) as amended in 1959, Mudaliar came to the conclusion that the establishment of Hindu Religious and Charitable Endowments Department in Madras "has stimulated the authorities of the religious institutions into action. The temples are being better looked after and maths are adopting programmes of religious and social education on a large scale". - Chandra Y Mudaliar, The Secular State and Religious Institutions in India, Franz Steiner Verlag, Wiesbaden, 1974, 245.

of religious institutions to avoid any maladministration of those institutions, delaying factors are adopted especially by wrongdoers alleging contravention of their alleged fundamental rights guaranteed by the Constitution. For example, in Digiadarsan R.R. Varu v. State of Andhra Pradesh,¹ the petitioner, a suspended head of a mutt called Shri Swami Hathiramji Math Tripathy Thirumalla, challenged the constitutional validity of the provisions of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966, and urged for an issuance of a writ in the nature of mandamus and direction to the Commissioner of Hindu Religious and Charitable Endowments, prohibiting him from exercising his powers under the Act. In that case, the petitioner was placed under suspension because of an enquiry which was pending against him. He was (as not seldom is the case) involved in serious charges including leading an immoral life and misappropriation. The main attack of the petitioner was against the power given to the Commissioner instead of the Court by the Act to make an enquiry into the charges against the mahant, and to try him and order his removal if those charges were established. The Supreme Court dismissed this contention on the ground that if any order of removal was made, that could be agitated in a Court or in an appeal to the High Court. The Court did not also accept the argument of the petitioner that the Andhra Pradesh Act had violated the rights of the petitioner as guaranteed under Arts. 25 and 26 of the Constitution. The decision in this case seems to be correct.

Again in Raja Bira Kishore Deb v. State of Orissa,² the petitioner, Raja Bira Kishore, challenged the constitutionality of the Shri Jagannath Temple Act, 1954 (Orissa Act 11 of 1955) on the ground that it infringed his fundamental rights guaranteed by the Constitution of India. Originally,

1. AIR 1970 SC 181 = (1969) 2 SCWR 831. See below, sec. 4 of the 6th chapter.

2. AIR 1964 SC 1501.

when the petitioner filed his suit he did it claiming that the Shri Jagannath temple was his private property and he was the owner of the temple. But he gave up the plea that the temple was his property when the case came before the High Court. He contended inter alia that the Act was hit by Arts. 26, 27 and 28. But the main reliance was placed on Art. 26(d) providing that subject to public order etc., every religious denomination had the right to look after its property in accordance with law. The Supreme Court rejected the appellant's contention and held that

"As a matter of fact, the petition was filed on the basis that the appellant was the owner of the temple which was his private property. There was no claim put forward on behalf of any denomination in the petition. Under these circumstances we are of opinion that it is not open to the appellant to argue that the Act is bad as it is hit by Art. 26(d)."¹

Before it came to its conclusion, the Court made a review of the provisions of the Orissa Act and found that those provisions were for the better management of the secular affairs of the temple and they did not interfere in its religious aspects. Property is here clearly separated from religion. As a result, the appeal was dismissed with costs. In my opinion, this is not enough. Litigants trying to appropriate property, which at first sight can be presumed not to belong to them, under the armour of the constitutional provisions, should be amenable to the criminal law. It is at least an attempt to deprive the deity of its property and to misappropriate or convert it dishonestly. It is criminal breach of trust under sec. 405 and punishable under sec. 406 of the Indian Penal Code, 1860 (Act 45 of 1860).²

1. Per Wanchoo, J.1510-1511.

2. Sec.405. Whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, expressed or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Sec. 406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

"A necessary element of the offence of the criminal breach of trust is that there should be entrustment of property to the accused. The entrustment may be in any manner" - V.B. Raju, Commentaries on the Indian Penal Code, vol. 2, 3rd ed., Eastern Book Co., Lalbagh, 1973, 1431.

The highest Court should not merely dismiss as infructuous cases naively revealing the ulterior motives of the petitioner. Nobody could afford to come to the Supreme Court for a meagre amount of money. In such circumstances, the Supreme Court dismissing a case with costs should take into account the time spent in dealing with it. In that case, litigants will think twice before they agitate baseless demands through appeals in the Supreme Court. Their attempts to buy time should be made most costly. The Constitution is not designed to aid unscrupulous money-hunting persons seated somehow in privileged positions.

The Constitution is there to provide protection for the deprived, and the Court redresses grievances arising out of actual contraventions of constitutional provisions. Thus in Krishnan v. Guruvayoor Devaswom¹ the Full Bench of the Kerala High Court accepted the claim of the petitioner that the Guruvayoor Act, 1971 (Act 6 of 1971) as amended by Act 28 of 1972, was unconstitutional and void on the ground that it was violative of Arts. 14 and 26 of the Constitution. The Act was enacted to make provisions for what purported to be the proper administration of the Guruvayoor Devaswom, the Guruvayoor temple. An indirect effect of the Act's provisions would be to give the state extraordinary patronage. Almost all the arguments put forward by the petitioner were accepted by the Court. The Full Bench found that the operative provisions of the Act as contained in some sections as challenged by the petitioner were invalid, and as a result the entire statute was rendered ineffective and void. The Kerala High Court particularly found that

"the provision of Section 4 (1) of the Act² must be held to be bad for the reason that the power of nomination conferred on the Government is naked and arbitrary without any safeguard being provided for ensuring that the Committee will be a body representing the denomination. The right to administer the Temple being vested in the denomination, any statutory provision

1. 1979 KLT 350 (FB) = AIR 1978 Ker 68 (FB).

2. Section 4 deals with the composition of the managing committee.

which completely ignores the denomination in the matter of setting up the Committee to administer the religious institution belonging to the denomination will necessarily be violative of Article 26 of the Constitution."¹

Further, we know that under Art. 25 of the Constitution all persons are entitled to propagate their religions. But that right to propagation had been hammered out, not at all easily, by the framers of the Constitution, to be included in the provisions of Art. 25. It was felt by one or two members of the Constituent Assembly that a right to propagate freely one's own religion might lead the Hindus to be affected by Muslim and Christian propagandists.² But those persons were unaware of the fact that Sikhism as a recognised branch of Hinduism,³ had a proselyting programme⁴ like Islam and Christianity. The Constituent Assembly ultimately recognised that the right to propagate was part and parcel of both Christianity and Islam. Now, this right is literally secured not only to Christians and Muslims but also to any person in India.

In Yulitha Hyde v. State of Orissa,⁵ the applicants, Christians, challenged the Constitutional validity of the Orissa Freedom of Religion Act (20 of 1968) on the ground that it infringed the fundamental right guaranteed under Art. 25 of the Constitution. They also petitioned the Orissa High Court to quash several criminal cases and to declare the said Act as ultra vires the Constitution. Section 3 of the Act which read that "No persons shall convert or attempt to convert either directly or otherwise, any person from one

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1. Per Eradi, J. 1979 KLT 350, 377-378 (FB) = AIR 1978 Ker 68 (FB), 93.
 2. M. Ghouse, op.cit., 5.
 3. The Arya Samaj, which propagates its religion, is also regarded as a branch of Hinduism as held in A.S.E. Trust v. Director, Education AIR 1976 Del 207. The Lingayats also propagate. But the definition of Hindu covers Buddhism only "for the special purposes of sub-cl.(b) of cl.(2) of Art. 25 and no other" as observed by Mudholkar, J. in Punjab Rao v. D.P. Meshram AIR 1965 SC 1179, 1184. In that case the main question was, whether the defendant who once was a member of a scheduled caste but had embraced Buddhism, was entitled to be a candidate for election to the State Legislative Assembly from a constituency reserved for members of the scheduled castes.
 4. J.D.M. Derrett, "Examples of Freedom of Religion", Contributions to Asian Studies, vol. 10, 1977, 42-51, 44-45.
 5. AIR 1973 Ori. 116.

religious faith to another by the use of force or by inducement or by any fraudulent means, nor shall any person abet any such conversion"¹ was directly concerned with Christians' right to propagation. The High Court of Orissa accepted the arguments of the petitioners and ruled that:

"(1) Article 25(1) guarantees propagation of religion and conversion as a part of the Christian religion.

(2) Prohibition of conversion by force or by fraud as defined by the Act would be covered by the limitation subject to which the right is guaranteed under Art. 25(1).

(3) The definition of the term 'inducement'² is vague and proselytizing activities may be covered by the definition and the restriction in Art. 25(1) cannot be said to cover the wide definition."³

But in Rev. Stainislaus v. State of Madhya Pradesh,⁴ a statute (the M.P. Dharma Swatantrya Adhiniyam, 1968) corresponding to the Orissa Act as mentioned above was impugned, but that was upheld by the Madhya Pradesh High Court. The Court did not accept the reasoning of the judgement in the Yulitha case⁵ as put forward by the Counsel for the petitioner. The main claim of the petitioner was that secs. 3, 4 and 5 of the M.P. Act were violative of his fundamental right guaranteed by Art. 25 of the Constitution. Sec. 3 of the Act prohibited conversion by use of force or allurement or by fraud. Sec. 4 provided for punishment for violation of Sec. 3. Sec. 5 required the person converting anyone to give information of the incident to the District Magistrate. Tare, C.J., who delivered the judgement of the Court, observed that

"We have to determine whether the M.P. Dharma Swatantrya Adhiniyam, 1968 violates Article 25(1) of the Constitution of India. In this connection we may observe that it is not merely the penal provisions which ought to be considered in exclusion [sic]. What is

1. AIR 1973 Ori. 116, 120.

2. Inducement "shall include the offer of any gift or gratification either in cash or in kind, and shall also include the grant of any benefit, either pecuniary or otherwise,..." Ibid., p. 120.

3. Per Misra, J., AIR 1973 Ori 116, 123.

4. AIR 1975 MP 163.

5. AIR 1973 Ori 116.

penalised is conversion by force, fraud or by allurement. The other element is that every person has a right to profess his own religion and to act according to it. Any interference with the right of the other person by resorting to conversion by force, fraud or allurement cannot in our opinion, be said to contravene Article 25(1) of the Constitution of India. On the other hand, it guarantees that religious freedom to one and all including those who might be amenable to conversion by force, fraud or allurement."¹

The decision of the High Court seems to be right, as pointed out by Derrett,² because of reported further disturbance relating to conversions in the State.

The aforesaid two cases of the Orissa High Court and the Madhya Pradesh High Court came before the Supreme Court and as the questions as raised in those cases were similar, they were dealt with together by the Supreme Court in Rev. Stainislaus v. State of Madhya Pradesh.³ Approving dictionary meanings of the word "propagate", the Supreme Court referred to Art. 25(1) and held that

"what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that in turn, postulates that there is no fundamental right to convert another person to one's own religion, because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike."⁴

But the fact is that in so far as Christianity is concerned, propagation and conversion go hand in hand, and the conversion of a person of a different religion into Christianity is an essential of that religion, and this was clearly pointed out in the case of Yulitha⁵ in one of the submissions of the petitioners relating to the Sixteen Documents of Vatican II that

"The Lord commanded;

"Go therefore and make disciples of all nations baptizing them in the name of the Father and of the Son ... Go into the

1. AIR 1975 MP 163, 168. 2. Derrett, "Examples of Freedom of Religion",

3. AIR 1977 SC 908. op.cit., 51.

4. Per Ray, C.J., ibid., p.911.

5. AIR 1973 Ori 116.

whole world, preach the gospel to every creature..."¹

So in the present case, the Supreme Court did not come to the rescue of Christians when the Acts of Orissa and Madhya Pradesh violated their right to freedom of religion guaranteed under Art. 25 of the Constitution.

b. The Cow-Slaughter Cases

Most of the cases so far discussed in this section were concerned with alleged violation of the rights of Hindus and those of Hindu religious denominations. But the cases concerning the ban of cow slaughter which the Supreme Court dealt with, concerned Muslims in general. Those cases are popularly known as cow-slaughter cases which came before the Supreme Court for its ruling on issues alleged to infringe the fundamental rights of Muslims as guaranteed by the Constitution. In M.H. Quareshi v. State of Bihar,² the petitioners questioned the constitutionality of three legislative enactments banning slaughter of certain animals including cows, passed by the States of Bihar, Uttar Pradesh and Madhya Pradesh. The petitioners were Muslim butchers. The said enactments were assailed on several grounds including economic and religious grounds. They contended that the impugned Acts would compel them to close their business and would practically deny them the right to carry on their occupation or trade in spite of the mandatory provisions of Art. 19(1)(g)³ of the Constitution. Against this contention of the petitioners, the Supreme Court held that in so far as the said Acts prohibited the slaughter of cows of all ages, they were valid, but total prohibition of slaughter of she-buffaloes, breeding bulls and working bullocks without prescribing any test as to their age or unfitness as in the provision of those Acts is violative of Art. 19(1)(g) of the Constitution. The important but sensitive issue

1. AIR 1973 Ori 116, 118.

2. AIR 1958 SC 731.

3. Art. 19(1)(g) provides that all citizens have the right to practise any profession or to carry on any occupation, trade or business. See D.D. Basu, Commentary on the Constitution of India, 5th ed., vol.1, S.C. Sarkar & Sons, Calcutta, 1965, 543.

of the case centred around the alleged violation of the right of Muslims to practise their religion as guaranteed under Art. 25 of the Constitution. The petitioners argued that in so far as the impugned Acts prohibited totally the slaughter of cows, they infringed their fundamental right secured to them by the said Article. But the Supreme Court did not approve this contention¹ and held that the sacrifice of a cow on the Bakr-Id-Day was not "an obligatory overt act for a Mussalman to exhibit his religious belief and idea. In the premises, it is not possible for us to uphold this claim of the petitioners."² The Court came to its conclusion only after its finding that

"The sacrifice established for one person is a goat, that for seven a cow or a camel. It is, therefore, optional for a Muslim to sacrifice a goat for one person or a cow or a camel for seven persons... The very fact of an option seems to run counter to the notion of an obligatory duty."³

Thus the Court found that the slaughter of a cow on Bakr-Id-Day was not an essential or an integral part of Islam.

In A.H. Quaraishi v. State of Bihar,⁴ the applicants challenged the constitutional validity of certain provisions of the amended Acts of Bihar, Uttar Pradesh and Madhya Pradesh. In this case, the Court followed its earlier decision in M.H. Quareshi's⁵ case except that it declared certain provisions of the impugned Acts as ultra vires.

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1. In a critical assessment of the Supreme Court decision Derrett comments that "Perhaps in no country are such questions fraught with greater anxiety. And for this reason we may note that an unresolved conflict exists between those cases where the courts have attempted to define "religion" merely as the relation between the individual conscience and its Maker (or the equivalent in non-theistic faiths), a definition that will not be accepted by the doctors of any of the five major faiths of India, and those which seek to protect under Arts. 25 and 26 rights extending (as the words of the Constitution strongly suggest) far beyond matters of private belief." - "Decisions", (1959) 8 ICIQ, 218-224, 224.
 2. Per Das, C.J., AIR 1958 SC 731, 740.
 3. Ibid. No Islamic authority for this theological-legal proposition was cited.
 4. AIR 1961 SC 448.
 5. AIR 1958 SC 731.

In cow-slaughter cases,¹ so in bigamy cases,

"The distinction between belief and practice is probably not interesting here as the recognition that the admitted presence of alternatives deprives the practice contended for its urgency when conflicting religious interests had to be resolved in the search for the welfare of the nation."²

But in Mohd. Faruk v. State of Madhya Pradesh³ the Court did not accept the reasoning of the case of M.H. Quareshi⁴ that in coming to its conclusion regarding the issue of the reasonableness of restriction on freedom of trade, Hindu sentiments should be taken into consideration. In that case, a notification issued by the Governor of the Madhya Pradesh under the Madhya Pradesh Act 23 of 1956 resulting in the prohibition of slaughter of bulls, etc. was impugned on the ground that it affected adversely the petitioner's constitutional right to carry on his trade or occupation. The Supreme Court bravely accepted the argument of the petitioner that as the prohibition of the slaughter of certain animals was made only to respect the sentiments of a certain section of people, the restriction was not reasonable in the interest of the general public. Thus Shah, J. spoke for the Supreme Court that

"The sentiments of a section of the people may be hurt by permitting slaughter of bulls and bullocks in premises maintained by a local authority. But a prohibition imposed on the exercise of a fundamental right to carry on an occupation, trade or business will not be regarded as reasonable, if it is imposed not in the interest of the general public, but merely to respect the susceptibilities and sentiments⁵ of a section of the people whose way of life, belief or thought is not the same as that of the claimant."⁶

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1. See the discussion of the two cow-slaughter cases in V.K.S. Chaudhary's "The Supreme Court and the Anti cow-slaughter Laws," AIR 1962 Jnl. 25-27.
 2. Derrett, RLSI, 473.
 3. AIR 1970 SC 93.
 4. AIR 1958 SC 731.
 5. In a different context the Delhi High Court did not give any consideration to Jain sentiments when it gave its decision in Suresh Chandra v. Union of India, AIR 1975 Del 168. In that case, the Government cultural programme for celebration of the 2500th anniversary of Mahavir was challenged by some Jain and Hindu petitioners. The Jain petitioners claimed that some activities in pursuance of the programme were not contemplated by their religion and these activities hurt the religious sentiments of the Jains. The Court held that the programme was a secular and cultural one and it had nothing to do with religion.
 6. AIR 1970 SC 93, 96-97.

In cow-slaughter cases or in similar circumstances where sensitive issues affecting religious harmony between two communities might arise, the Courts could apply a useful theory of balancing of interests as suggested by Ghouse when he observes that

"Unlike the mechanical rule evolved by the Indian Courts, this theory requires the scrutiny of the purpose and effect of the challenged legislation and not the essentials of the violated religious practice.

"Employment of this technique to ascertain the secular purpose and effect of the impugned Acts in Hanif Quareshi's case would have compelled the Court to consider the policy underlying the challenged legislation within the framework of Article 25. The challenged laws could have been upheld only as measures of "social welfare" under clause 2, Article 25."¹

Now reverting to Mohd. Faruk's case,² it may be said that the Supreme Court paid scant consideration to Hindu sentiments when it reached its decision in the case, but did it do so rightly? In my opinion, one cannot shut one's ears in a case of that kind to the sentiments of a section of the people forming the overwhelming majority of the total Indian population. Hindus, in general, do respect cows as they do different gods. I am not arguing that the sentiments of the majority should prevail over or should be preferable to those of members of different minority communities, but in so far as the issue of cow slaughter is concerned, Hindu sentiments should be given due consideration by the Court, at least for the sake of public order, because these sentiments led or may lead to communal riots.³ Economic factors should not prevail over the question of public order. But the real assessment of the situation without any exaggeration has been made in Das, C.J.'s observation in M.H. Quareshi's case⁴ that

"There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notion and this sentiment has in the past even led to communal riots."⁵

1. M. Ghouse, op.cit., 136.

2. AIR 1970 SC 93.

3. M.H.Quareshi v.State of Bihar AIR 1958 SC 731, 745.

4. AIR 1958 SC 731.

5. Ibid., p. 745.

It might sound strange to a non-Hindu that Hindus hold the cow as an object of veneration, but this is a fact of life in so far as the Hindu community is concerned. The cow-slaughter issue is a delicate one which must be tackled by the Court giving proper consideration to Hindu sentiments involved in it. To most Hindus "The cow is Heaven, the cow is Earth, the cow is Vishnu, Lord of Life"¹ - one may not like it, but this is true.

But the point is that India is a secular State formally declared as such by the Constitution of India.² Under Art. 25 all persons whether Hindus or not are equally entitled to the right to freedom of religion. Cow slaughter cannot be banned totally³ without infringing fundamental rights of Indian Muslims. Under Art. 25 the Constitution of India protects not only religions but also practices associated with them. It is, therefore, clear that for Indian Muslims the slaughter of cows is a religious obligation, and to take away this obligation is or would seem to be interference with religious freedom.⁴

c. Protection of Religion under the Indian Penal Code.

Now one important point is that the freedom of religion as guaranteed under Art. 25 of the Constitution is not comprehensive and the protection of religion, in its real sense, would not have been possible but for some provisions in the Indian Penal Code providing protection of religion

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1. Hymn 10 in Book X of Atharva Veda, Translation by Ralph Griffith as cited at p. 745 in M.H. Quareshi's case (AIR 1958 SC 731).
 2. See the Constitution (Forty-Second Amendment Act), 1976, which inter alia provides that "In the Preamble to the Constitution...for the words "SOVEREIGN DEMOCRATIC REPUBLIC", the words "SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC" shall be substituted...."
 3. Jain's argument that "Since reverence to the cow is a part of Hindu culture, it is in the fitness of things that at least in India where the overwhelming majority is that of Hindus, cow slaughter should have been banned in order to preserve the culture irrespective of any considerations. When we pay our veneration to some object it is a matter of faith and conscience, and economic factors should not be brought into it" - is not tenable because India is not a Hindu State, it is a country belonging not only to Hindus but also to Muslims, Christians, Buddhists and others. See P.C. Jain, Law and Religion; a comparative study of the Freedom of Religion in India and the United States, M/s Anup Chand Sarup Chand, Allahabad, 1974 (?), 292.
 4. Derrett, RLSI, 472.

of both individuals and classes. Sec. 298 protects the religious feelings of individuals and secs. 295 and 295A deal with the protection of religion of a class or classes, but this protection is achieved indirectly through the provisions in the sections for preventing religious or communal disturbances by penalising offenders. These three sections are reproduced below for ready reference:-

Sec. 298. Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.

Sec. 295. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction damage or defilement as an insult to their religion shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

Sec. 295-A. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.

In Kitab Ali v. Santi Ranjan,¹ the accused persons slaughtered a bullock in an open space close to the house of the complainant. The slaughter was carried on in spite of the protest of the complainant with the deliberate intention of hurting his religious feelings. The Magistrate found all the accused persons guilty under sec. 298. His finding was upheld by both the Courts of the Sessions Judge and the Tripura Judicial Commissioner. Singh, J.C. held that

"the accused persons could pursue their religious practices so as not to offend the religious feelings of others which might cause breach of public order, i.e. the public tranquillity and peace. In the present case, as has been found by the learned Magistrate, the accused persons had caused the slaughter of the bullock in an open public space in spite of protest by the complainant, a Hindu."²

1. AIR 1965 Trip. 22.

2. Ibid., p. 25.

In the present case, the Court for its decision, relied on Mir Chittan v. Emperor,¹ in which the accused slaughtered a cow in full view of the houses of Hindus in broad daylight. The Court held him guilty of an offence under sec. 298.

But there was an authority to the effect that cow slaughter in a space where Hindus might see it, was not an offence under the Penal Code. Thus in Queen-Empress v. Imam Ali,² the accused were convicted by the Magistrate for killing cows by the side of a public highway. Both the Sessions Judge and the Full Bench of the High Court of Allahabad disagreed with the decision of the Magistrate's Court. In that case, the accused were tried³ under sec. 295 whereas in the case of Kitab Ali⁴ the defendants were tried under sec. 298.⁵ But the striking difference between the two cases is that in Kitab Ali's case,⁶ the finding of the Court was that the accused persons slaughtered the bullock in an open public place in spite of protest by the complainant whereas in the case of Imam Ali,⁷ there was no evidence to

1. AIR 1937 All 13.

2. ILR (1887) 10 All 150 (FB).

3. Section 295 of the Indian Penal Code does not apply to the cases where the religious sentiments of Hindus would be hurt by slaughtering cows. It is applicable to inanimate objects as held in Imam Ali's case ILR (1887) 10 All 150 (FB) 153. Thus the section inter alia reads "Whoever destroys ... any object held sacred by any class of persons, with the intention of thereby insulting the religion of any class of persons ... shall be punished with imprisonment...." So a person for hurting Hindu sentiments by slaughtering a cow (an animate object) cannot be convicted under sec. 295 which applies to inanimate objects only. See Ali Muhammad v. Crown (1917) P.R. No. 10 of 1918 (FB) which follows the Allahabad case cited above. See also Derrett, RLSI, 450, footnote 2, where he suggested a comparative study between the Tripura case, AIR 1965 Trip 22 and the two Full Bench cases referred to above.

4. AIR 1965 Trip 22.

5. See Sheik Amjad v. King Emperor ILR (1942) Pat. 315. It was held there that there would not be any conviction under sec. 298 if any insulting gesture or uttering insulting words was made without deliberate intention of offending religious feelings. The accused person's killing a cow on the occasion of Bakr-I-Id was held done not with the object of hurting Hindu religious feelings.

6. AIR 1965 Trip 22.

7. ILR (1887) 10 All 150 (FB).

the effect that the accused ever meant to hurt religious feelings by slaughtering cows.

Again in Ramji Lal Modi v. State of Utta Pradesh,¹ the accused was the editor, printer and publisher of a monthly magazine devoted to cow protection. The High Court of Allahabad held that the article in question was published deliberately by the accused with the intention of offending religious feelings of Muslims and the accused was guilty under sec. 295A. In appeal, the Supreme Court upheld the decision of the High Court. In that case, the accused argued that sec. 295A was void as it interfered with his fundamental right guaranteed by Art. 19(1)(a) of the Constitution providing right to freedom of speech and expression. The contention was that the impugned section could not be accepted as a law imposing reasonable restrictions on the exercise of the right under Art. 19(1)(a) as provided in clause 2. Cl. 2 of Art. 19 empowers a State to make laws in the interest of the sovereignty and integrity of India, public order, decency, morality, etc. The Supreme Court held that sec. 295A "is well within the protection of Cl (2) of Art. 19 as being a law² imposing reasonable restriction on the exercise of the right to freedom of speech and expression guaranteed by Art. 19(1)(a)."³

The case of Sant Das v. Babu Ram⁴ was concerned with the publication of two books by one of the two branches of the Radhasoami faith at Agra. It was alleged that the books were written in such a manner as to outrage the

1. AIR 1957 SC 620.

2. The issue of interpretation and scope of cl. (2) of Art. 19 was the main question in both Ramesh Thappar v. State of Madras, AIR 1950 SC 124, involving an English journal called The Cross Roads, and Brij Bhuhsan v. State of Delhi, AIR 1950 SC 129, involving an English weekly in Delhi, called The Organizer. Both these two cases were referred to in the present case of Ramji Lal. Sastri, J. gave the majority decision on the point when he observed that "cl. (2) of Art. 19 having allowed the imposition of restrictions of the freedom of speech and expression only in cases where danger to public security is involved, an enactment which is capable of being applied to cases where no such danger could arise, cannot be constitutional and valid to any extent" p. 129.

3. Per Das, C.J., AIR 1957 SC 620, 623.

4. AIR 1969 All 436.

religious feelings of one of the branches, Radhasoami Satsang Sabha, which filed a complaint against the manager of a press and the printer of the said two books, under sec. 295A of the Indian Penal Code. Against the contention of the defendants that sec. 295A was violative of both Arts. 25 and 26 of the Constitution, Singh, J. spoke for the High Court of Allahabad that "This Section 295-A of the Indian Penal Code does not at all ... come in conflict with either Article 25 or Article 26 of the Constitution and cannot by any stretch of imagination, be said to be violative of those provisions."¹

It may be pointed out that the right to freedom of speech and expression as provided by Art. 19 of the Constitution implies also the right to use loudspeakers for the expression of a person's views in public places. In Indulal v. State of Gujarat,² the petitioner challenged the constitutionality of the Bombay Police Act, 1951 particularly sec. 33 of the Act empowering the Commissioner and the District Magistrate to regulate the use of loudspeakers in or near public places. Though the claim of the petitioner failed in that case, Miabhoy, J., gave his opinion on the right to the use of loudspeakers when he ruled that

"If the journalist can avail himself of the mechanism of his press for reaching a wider circle of audience, there is no reason why a person, who has at his disposal a more modest instrument like the microphone, should not avail himself of that instrument. There is ample authority for the proposition that the freedom of speech and expression includes the freedom of circulation."³

The aforesaid right to the use of microphones is not confined to the circulation of political views only,⁴ it is available to any person for the purpose of religious propaganda subject to public order, morality and health. In Masud Alam v. Commr. of Police,⁵ some mosques in Calcutta

1. AIR 1969 All 436, 439.

2. AIR 1963 Guj 259.

3. Ibid., p. 264.

4. In that case, a party named "Ahmedabad Samiti" was formed to contest a local municipal election.

5. AIR 1956 Cal. 9.

introduced electrical loudspeakers for calling prayers five times a day. The Police Commissioner issued licences to two mosques for using loudspeakers but refused to grant permission to others to use them on the ground of the complaint of several residents about their use. The High Court upholding the refusal approved the ruling of Chagla, C.J. in a Bombay High Court case¹ which incidentally was not about public order but of social reform, to the effect that religious practices going against public order were to give way to the good of the public at large. Sinha, J., as he then was, was very critical of random use of loudspeakers in religious festivals, especially in Hindu religious ones. It is worth quoting his remarks because of their clear depiction of the effect of the use of microphones in Calcutta in religious houses and festivals. Thus his Lordship observed that

"The indiscriminate use of the electric loudspeaker in connection with religious festivals in the city is a standing grievance of every peace-loving citizen. The most offending instances are the uses to which it is put in connection with Hindu festivals, when the city is racked with the raucous cacophony of a thousand loudspeakers, doling out cheap jazz or cinema music, which is not only singularly inappropriate to such occasions, but to my mind, destructive of public health² and morals."³

I fully agree with the view of the learned Judge and there is no doubt that public health is already in a deteriorating condition in that unfortunate city.⁴ Sinha, J. mentioned the use of loudspeakers in religious houses or festivals only, but he omitted to tell us about the use of those things even in private social occasions like marriage ceremonies. In this overcrowded city, the elderly men and women, patients in serious conditions, and even babies who need rest literally in pin-drop silence, are not cared

1. State of Bombay v. Narasu Appa Mali AIR 1952 Bom 84. But the judgement in Sardar Syedna Taher Saifuddin v. Tyebbhaji Moosaji Koicha AIR 1953 Bom 183, which followed the view of religion held in Narasu Appa Mali's case was rejected by the Supreme Court on appeal in Sardar Syedna Taher Saheb v. State of Bombay AIR 1962 SC 853.

2. Emphasis is mine.

3. AIR 1956 Cal 9, 10.

4. The city is unfortunate for several reasons. Once it was the capital of the whole of British India, then it was the capital of undivided Bengal until 14th August, 1947 and thereafter it has been stripped of much of its importance. Moreover, it has become one of the most crowded cities due to the influx of Hindu refugees from the then East Pakistan and poor job hunters from neighbouring states.

for by those who express their personal or religious feelings through amplifying devices. In my opinion, the use of loudspeakers on such occasions should be banned solely on the ground of public order. The fundamental right of religion or that of speech must give way to the good of patients, elderly people and babies.

Now, the protection afforded to religion by the Indian Penal Code is not really the protection of religion as such, but the provisions in the Code are actually intended for keeping peace among different communities. Many offences punishable under sec. 295 or sec. 295A are directed to communal ends. Thus in Sheo Shankar v. Emperor,¹ the complainant, a Ahir (a Sudra), in pursuance of the ambition to obtain social and religious ranking, took to the wearing of a sacred thread reserved for (twice born) initiates. Some Brahmins beat him and tore off the sacred thread. The High Court did not accept the case as one involving offending of the complainant's religious feeling as to fall under the purview of sec. 295. Thus the Court held that

"in the circumstances at the present case where persons observing the same religion, broke the thread of some one whom they regarded as an upstart wearing something which he was not entitled to wear, either the victim of assault would be likely to consider that act an insult to his religion or the assailants would be considered to have the knowledge that he was likely so to do. The truth of the matter is that it was not the religious susceptibilities of the complainant Gajodhar which were injured but his dignity and therefore we do not think that a conviction under sec. 295, Penal Code, is sustainable."²

In S. Veerabadran Chettiar v. E.N. Ramaswami Naicker,³ a clay image of the god Ganesa held sacred by many Hindus was broken publicly by the accused "as part of a political campaign, possibly with the object of opening the eyes of the masses (?)"⁴ The Supreme Court did not share the view expressed by the Court below that as the image was not consecrated it was not to be considered an object held sacred. In short, the Supreme

1. AIR 1940 Oudh 348.

2. Ibid., p. 351.

3. (1959) 22 SCJ. 1.

4. Derrett, RLSI, 449.

Court did not accept the argument that the image was not an idol in the sastric sense. Sinha, J. as he then was, held for the Court that

"Any object however trivial or destitute of real value in itself if regarded as sacred by any class of persons would come within the meaning of the penal section. Nor is it absolutely necessary that the object, in order to be held sacred, should have been actually worshipped. An object may be held sacred by a class of persons without being worshipped by them."¹

The facts of the present case illustrate the view that

"The majority can no more insult the religions of the minorities than the latter can set out to outrage the religious feelings of the majority. This is a feature of India which goes far to justify the claim to be a secular state in the sense that there is no preference for the religion of the majority of the inhabitants."²

d. The Secular State of India

India was not formally a secular State until the introduction of the Constitution (Forty-Second Amendment) Act, 1976. But judging the different provisions of the Constitution, different legal and political thinkers expressed their opinions on the subject whether India was a secular state or not, and they were by no means unanimous in their opinion about it. Some examples might be given to this effect. Thus Luther, in his pioneer work,³ accepting the United States Constitution as the criterion for judging a constitution to be secular or not, has expressed the view that India is not a secular state, it is rather religiously impartial. He observes that

"The term 'Secular State' denotes a definite pattern of State-Church relationship which is not incorporated in the Indian Constitution. Its continued use is bound to give a wrong impression about the nature of the State in India. It has been already indicated that in terms of the western patterns, India can be described as a jurisdictional state. If a simpler term is to be used it would perhaps be appropriate to describe it as a 'religiously impartial' or non-communal (non-denominational) state."⁴

1. (1959) 22 SCJ 1, 5.

2. Derrett, RLSI, 449.

3. V.P. Luther, The Concept of the Secular State and India, Oxford University Press, Calcutta, 1964.

4. Ibid., p. 155.

Derrett supports Luther's view to the extent that India cannot be described as a secular state when he speaks in the context of reforms relating to the Untouchability (Offences) Act, 1955; that

"Dr. Luther is right in detecting that a state which acts so cannot call itself a secular state on a pattern known to the United States, for example. In this approach to India, Professor Donald Smith and Dr. Luther are virtually agreed. It can hardly be a secular State which has as one of its admitted aims a programme to which the accepted and acknowledged religious authorities of the majority of the inhabitants (not merely a minority) are determinedly opposed."¹

In his masterpiece, Smith analysing and weighing various factors, raises the question to himself about whether India is a secular state. Thus the learned author questions and observes that

"Is India a secular State? My answer is a qualified 'Yes'. It is meaningful to speak of India as a secular State, despite the existence of problems ... India is a secular State in the same sense in which one can say that India is a democracy."²

But Galanter gives an unqualified yes to the question when he says that

"The Constitution is openly and determinedly secular. Religious discrimination on the part of the State is forbidden. Freedom of religion is

guaranteed."³ Gajendragadkar consistently stresses the point in his various works⁴ that India is a secular state. In the recent edition (4th) of B.K.

Mukherjea's "The Hindu Law of Religious and Charitable Trusts,"⁵ he

1. Derrett, RLSI, 453-454.

2. D.E. Smith, India as a Secular State, Princeton University Press, Princeton, New Jersey, 1963, 499-500.

3. Marc Galanter, "The Problem of Group Membership: Some Reflections on the Judicial View of Indian Society", Journal of the Indian Law Institute, 1962, vol. 4, 331-358, 347.

4. P.B. Gajendragadkar, "Secularism: Its Implication for Law and Life in India" in G.S. Sharma (ed.) Secularism Its Implications for Law and Life in India, N.M. Tripathi, Bombay, 1966, 1-8, 5; See also by the same author, The Indian Parliament and the Fundamental Rights, Eastern Law House, Calcutta, 1972, 53-54.

5. Calcutta, 1979. P.B. Gajendragadkar along with P.M. Bakshi have edited the present book. See also Gajendragadkar's book, Secularism and the Constitution of India, University of Bombay, Bombay, 1971. He has observed (at p.173) in the book "that secularism under the Indian Constitution is not a merely political doctrine. It is not a positive or negative doctrine. It is a comprehensive, forward-looking, dynamic doctrine."

expresses clearly that

"Secularism as enshrined in the relevant provision of the Constitution is neither anti-God nor anti-religion. At the same time, the Republic of India has no official religion of its own. It tolerates all religions. It guarantees freedom to all religions which are practised in India and treats each one of them with equal respect."¹

The concept of a secular State and that of freedom of religion go hand in hand and freedom of religion, a different expression of protection of religion, is a volatile subject,² dealt with by philosophers, jurists and political thinkers alike. In so far as the Constitution of India is concerned, the Forty-Second Amendment (1976) Act has not changed the colour of the Constitution in this context; it remains much the same as it was before the Act came into force. Luther is right in so far as he holds the view that India is not a secular State in the same sense as the United States is, but in my opinion, India could not even be categorized as a religiously neutral state. In so far as minority religions are concerned, no doubt protection to them has been greatly achieved by the provisions of the Constitution, but the Constitution does not seem to stand impartially on the religion of the overwhelming majority of the population because of the reasons shown in Derrett's aforesaid observation relating to, for example, the Untouchability Act, 1955, renamed as the Protection of Civil Rights Act by the introduction of the Untouchability (Offences) Amendment and Miscellaneous Provision Act, 1976 (Act 106 of 1976). The Constitutional provisions seem to be peace-keeping formulae for maintaining harmony among different religions, and they heavily tilt against the religious interests of the majority population. But it must be stressed that the provisions reveal in effect a tolerance and magnanimity on the part of the majority towards minority religious communities.

To conclude this study it may be said that protection of religion as

1. Mukherjèa, op.cit., 4th ed., 396.

2. V.M. Bachal, Freedom of Religion and Indian Judiciary, Shubhada Saraswat, Poona, 1975, 1.

guaranteed by Art. 25 of the Constitution of India is very limited due to the important proviso in the Article that matters concerning social reform and those relating to public order, morality and health take precedence over religious freedom however defined. Under Art. 25(2)(b) the state legislature is empowered to enact laws in the interests of social welfare and of reform. Apparently Art. 25 may be taken as the embodiment of provisions providing for every individual the right freely to profess, practise and propagate religion, but proper scrutiny of the provisions will reveal that non-religious or secular provisions in the Article, e.g. providing for social welfare and reform, have curtailed much of the content of the right to freedom of religion. In so far as Art. 25 is concerned, freedom of religion seems to be a show piece and most of that freedom has been subsumed by the provision for 'social welfare' and 'reform'.

In so far as excommunication is concerned, the Courts should not allow any community to expel a member resulting in his loss of civil rights, even on the ground of an offence against his religion. In my opinion, no community should be allowed to compel its members to follow its religion if that member does not believe in that faith at all, and that community should not be permitted to excommunicate him resulting in loss of civil rights. From the standpoint of humanity and constitutionally accepted aims¹ of the social welfare of every individual, a community should not be allowed to throw a disbeliever in the streets where he might not have any means for his survival. Moreover, India is not a welfare state which can look after its citizens from cradle to grave. Any human life is more important than a religious dogma. Religion itself is for individuals but not the other way round. No doubt this point of view reflects the modern age in which the total solidarity of the collective society is neither worked for nor found.

1. For example, Art. 38 of the Constitution of India reads: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

SECTION 2. CIVIL PROCEDURE CODE: THE COURT'S JURISDICTION IN MATTERS OF RELIGION

a. The Court and Matters of Religion

The origin of clause (b) of Article 26 of the Constitution of India that every religious denomination is entitled "to manage its own affairs in matters of religion" can be traced ultimately to Explanation I of section 9 of the Code of Civil Procedure, 1908, as amended by the Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976). The only explanatory clause of the old section 9 has been numbered as Explanation I by the Act 104 of 1976 which has introduced Explanation II as a new provision of the section. Because of its importance in our present study and for ease of reference the section, as it stands now, may be reproduced below:

Section 9. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation I. A suit in which the right to property or to an office is contested is a suit of civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites and ceremonies.

Explanation II. For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.

The term "civil" in sec. 9 of the Civil Procedure Code excludes all criminal proceedings, but it cannot be taken as merely opposite to the word 'criminal', for there are suits which though they are not concerned with matters of crime, yet they are not classified as of a civil nature. Thus Explanation I implies that suits as to religious rites or ceremonies involving no question of right to property or to an office, are not suits of a civil nature. It is neither a province nor a duty of a Civil Court to pronounce on religious tenets or to regulate purely religious rites or duties, and to this effect law seems to be firmly laid down in a long line of authorities.¹

1. Vasudev v. Vamnaji ILR (1880) 5 Bom 80.; Lokenath Misra v. Dasarathi Tiwari ILR (1905) 32 Cal 1072; Thiruvengkatchariar v. Krishnasami Thattachariar AIR 1915 Mad 877; Advocate-General of Bombay v. Yusuf Ali

In Advocate-General v. Yusuf Ali Ebrahim¹ which was concerned with charities of the Dawoodi Borahs, Marten, J. had observed that

"speaking very generally, the protection of the law in religious matters is confined to the protection of religious property or a religious office. The Court will not decide mere questions of religious rites or ceremonies (see C.P.C. 5.9) nor will it, I think pronounce on religious doctrine (see Attorney General v. Pearson) unless it is necessary to do so in order to determine rights to property, as in Free Church in Scotland (General Assembly) v. Overtown (Lord)."²

But the pioneer case on the subject concerned is that of Vasudev v. Vamnaji.³ In that case, the plaintiffs representing a management committee of a temple, brought the suit to compel the defendants, hereditary priests, to take out certain ornaments from the treasury and to put them on the image of a God on such days as might be appointed by the committee and they also sought a declaration that the defendants would be responsible for the safe keeping of the ornaments after they had been taken out from the treasury. The High Court pointed out that in both the lower Courts no question as to jurisdiction of a Civil Court to entertain the suit had been raised. Melvill, J. delivered the judgement for the Bombay High Court. Thus his Lordship observed that

"Both the lower Courts have awarded the claim. It does not appear that in either Court any question was raised as to the jurisdiction of a Civil Court to entertain such a suit; nor is any objection of the kind set forth in the memorandum of appeal to this Court. But on the first statement of the case, it appeared to us more than doubtful whether a Civil Court is competent to issue an injunction, which could only be enforced by imprisonment, to compel the performance of the ceremonial idol worship; and we, therefore, expressed a wish that arrangements should be, in the first instance, directed to this point..."

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AIR 1921 Bom 388; Devchand Totaram v. Ghanashyam AIR 1935 Bom 361; Narayana Mudali v. Kalathi Mudhali AIR 1939 Mad 494; Appadorai v. Annangarachariar AIR 1939 Mad 102; Bachaspatimayum v. Aribam AIR 1955 NUC 4546; Sinha Ramanuja v. Ranga Ramanuja AIR 1961 SC 1720; Ramchandra v. Gavalaksha (1973) 75 Bom LR 668; Ushaben v. Bhagyalaxmi AIR 1978 Guj 13.

1. AIR 1921 Bom 338.
2. Ibid., p. 355.
3. ILR (1880) 5 Bom 80.

"...The regulation of religious ritual is not within the province of the Civil Courts. In England, no doubt, there are courts which have power to compel the due performance of public worship; but they are Courts specially constituted for the purpose; and this circumstance itself indicates that there is no such jurisdiction inherent in the ordinary civil Courts ... It is the policy of the State to protect all religions, but to interfere with none. It is for those who profess any form of religion to adopt such ritual as they think fit, and to make and enforce such rules as may be necessary to secure its due observance".¹

The last two sentences of the aforesaid observation of Melvill, J. seem to coincide in different language with the statement of Mukherjea, J. as he then was, in the Shirur Math case² that

"a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters".³

In Sinha Ramanuja Jeer v. Sri Ranga Ramanuja Jeer,⁴ the main question for decision was the maintainability of a suit regarding honours and perquisites in the temple of Athinathalwar in Alwar Tirunagari. But the Supreme Court while dealing with the main question had also given its deliberation on the scope of Explanation⁵ of section 9 of the Civil Procedure Code. Subba Rao, J. as he then was, who delivered the judgement of the Supreme Court, held that

"Section 9 of the Code of the Civil Procedure describes the nature of suits which a court has jurisdiction to entertain. It can entertain any suit of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. As a corollary to this, it follows that a Court cannot entertain a suit which is not of a civil nature. Prima facie suits raising questions of religious rites and ceremonies only are not maintainable in a civil Court, for they do not deal with legal rights of parties. But the explanation to the section accepting the said undoubted position says that a suit in which the right to property or to an office is contested is a suit of civil nature notwithstanding that such right may depend entirely on the decision of a question as to religious rights or ceremonies. It implies two

1. ILR (1880) 5 Bom 80, 81-82

2. AIR 1954 SC 282.

3. Ibid., p.291. See above, pp.20-21.

4. AIR 1961 SC 1720.

5. There was no Explanation II in the Code of Civil Procedure when the Supreme Court case was decided, and the Explanation as referred to above by the Supreme Court is Explanation I in the amended Code.

things, namely (i) a suit for an office is a suit of a civil nature; and (ii) it does not cease to be one even if the said right depends entirely upon a decision of a question as to the religious rites or ceremonies. It implies further that questions as to religious rites or ceremonies cannot independently of such a right form the subject-matter of a civil suit. Honours shown or precedence given to religious dignitaries when they attend religious ceremonies in a temple cannot be placed on a higher footing than the religious rites or ceremonies, for they are integral parts of the said rites or ceremonies in the sense that the said honours are shown to persons partaking in the ceremonies".¹

Then the learned Judge cited many cases and summarised the law² on the subject relating to religious honours and privileges and held that "A suit for a declaration of religious honours and privileges simpliciter will not lie in a civil court".³

Quite often serious disputes, involving potential breaches of the peace, start as differences over rights or in respect of temples, their management, or ceremonies. Social status is often marked by such matters and denial of a customary or traditional right can, to the affected parties, be more damaging than mere denial of a pecuniary or other property claim. Furthermore tension between conservative and reforming parties can express itself in the form of overt disputes to which someone, presumably the state, as impartial arbiter, is expected to provide a solution.

In Ramachandra Keshav Gore v. Gavalaksha Gangadhar Swami⁴ the plaintiffs

1. AIR 1961 SC 1720, 1724.

2. The law on the subject was already firmly laid down in innumerable decisions of different High Courts. See Striman Sadgopa v. Kristna Tatachariar (1862-63) 1 Mad HCR 301; Sangapa v. Gangapa ILR (1878) 2 Bom 476; Shankar v. Malhar AIR 1931 Bom 273; Chitti Babu v. Venkatasubbu AIR 1933 Mad 264; Thathachariar v. Iyengar AIR 1938 Mad 334; Suryanaray-anamurthi v. Rama Rao AIR 1953 Mad 701; Shivagnanam v. T.M. Chidam-barathanu ILR (1954) Tra-Co 1338. See also Athan Sadgopachariar v. Elayavalli (1913) MWN 289; Periayanan v. Mahadevan AIR 1935 Mad 679; Sri Emberumanar v. Board of Commrs. H.R.E. AIR 1936 Mad 973.

But a contrary decision had been reached in a very old case (Narayan v. Balkrishna (1872) 9 BHCR 413) of the Bombay High Court. It had been held there that the defendants violated the plaintiff's exclusive right of breaking a curd-pot in a part of the temple in question by breaking their own curd-pot in the same place, thereby entitling the plaintiff to damages.

3. AIR 1961 SC 1720, 1727.

4. (1973) 75 Bom LR 668.

brought a suit for an injunction directing the defendants, trustees of Shri Rama Temple at Chafal, to instal the original idol of Shri Rama only and restraining them from installing new idols in the holy of holies of the renovated and reconstructed temple. Vaidya, A.C.J., who delivered the judgement of the case, followed the principles enunciated in Sinha Ramanuja's case¹ and fully approving the view of Melvill, J. on the subject as expressed one hundred years earlier in Vasudev v. Vamnaji² held that

"Although the Madras case in the Supreme Court decision related to namams claimed by the plaintiff in that case, it is clear that the principle on which the case was decided was that in religious and ceremonial matters, the civil Court could not grant any relief as it did not relate to civil rights. In my judgement the dispute in the present case is completely covered by the judgement of Melvill, J. which has stood the test of time all these years and which clearly laid down that although the policy of the State is to protect all religions it has also not to interfere with any. Even assuming that the plaintiffs had some religious rights to worship Shri Ram's idol without any other idols being installed, the defendants and others who support the installation of other idols had also the right to worship in their own way. In such matters which are purely religious, a civil Court will not interfere as it is not a civil dispute".³

But it must be remembered that the question of form of worship, ceremony, etc. are not on the same footing as the question of a right to worship. India neither did, nor does, take a strict *secularist* standpoint here. A right to worship is a civil right and a suit filed to restrain persons from interfering with such a right is a suit of a civil nature. This position of law is firmly established and has been vindicated in many decisions of the High Courts and the Supreme Court.⁴

1. AIR 1961 SC 1720.

2. ILR (1880) 5 Bom 80.

3. (1973) 75 Bom LR 668, 673.

4. Ata-Ullah v. Azim-Ullah ILR (1890) 12 All 494. It had been held in that case that every Muslim had a right of prayer in a mosque. Jangu v. Ahmed Ullah ILR (1891) 13 All 419 (FB). In that case it had been held that right of worship in a public mosque was open to all Muslims who went there for religious purposes; Thirumalai v. Srinivasachariar AIR 1917 Mad 903; Velayudha Gonundan v. Ponnuswami Udayar AIR 1945 Mad 234; Manogobinda Panda v. Sachchidananda Swami AIR 1953 Ori 151; Md. Wasi v. Bachchan Sahib AIR 1955 All 68. It was held there that right of prayer in a mosque belonged to all sects of Islam; P. Majlissae Islamia

A case apparently concerned only with a matter of ceremonies may really involve substantial civil rights. The case of Ugam Singh v. Kesrimal¹ was concerned with the dispute between two sects, the Digamber and the Swetamber sects of the Jain religion regarding the right of worship of the Digamberi sect of the idol of Adeshwarji, the first Jain Tirthankar, in the temple named after him at Paroi. It was alleged in the suit that the defendants, belonging to the Swetamberi sect, had attempted to convert the said idol as the idol of Swetamberi sect by putting artificial eyes on it. In that case, the main argument put forward by the defendants was that "the civil Court had no jurisdiction to decide the religious rights of the parties nor is it a dispute of a civil nature."² Reddy, J. delivering the judgement for the Supreme Court referred to two cases³ of the Supreme Court and the Privy Council and held that "a right to worship is a civil right,⁴ interference with which raises a dispute of a civil nature...."⁵

Now the law as laid down in both the cases of Sinha Ramanuja⁶ and

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v. Sheik Muhammad, AIR 1963 Ker 49. In that case it was held that the right of a Muslim to offer prayer was a civil right. Madhavan Nair, J. who delivered the judgement of the case observed (at p.50) that "In Nar Hari Shastri v. Sri Badrinath Temple, AIR 1952 SC 245 the Supreme Court held that the right of entering the temple was not a precarious or a permissive right depending for its existence upon the arbitrary discretion of the temple authorities, but a legal right to the true sense of the expression. It is a clear pronouncement that the right of worship is a civil one and comes squarely with the cognisance of the civil Courts of the State"; Ugam Singh v. Kesrimal AIR 1971 SC 2540; Dayalal v. Pyar Chand AIR 1972 Raj 149; Kuber Mahapatra v. Nilakantheswar Dev AIR 1974 Ori 21; Muniandi Kone v. Arulmigu Mangalanathaswami Temple (1982) 1 MLJ 20.

1. AIR 1971 SC 2540.
2. Ibid.
3. Nar. Hari Shastri v. Shri Badrinath Temple, AIR 1952 SC 245, and Hukum Chand v. Maharaj Bahadur Singh AIR 1933 PC 193. In the latter case the Privy Council had dealt with questions relating to practices observed by both the Digamberi and the Swetamberi sects on the Parasnath Hill.
4. But there is a difference of opinion regarding the issue whether the right to perform spiritual duties is a civil right. See Appendix 1.
5. AIR 1971 SC 2540, 2545.
6. AIR 1961 SC 1720.

Ugam Singh,¹ is that questions as to religious rites and ceremonies alone cannot form the subject-matter of a civil suit. Moreover, in Shirur Math's case,² the Supreme Court pointed out that questions as to essentials of a particular religion would be judged by the community itself. But in decisions of High Courts in bigamy cases³ and in judgement of the Supreme Courts in cow slaughter cases, the principles as have been laid down by Melvill, J, in Vasudev's case⁴ as approved by the Supreme Court in Sinha Ramanuja's⁵ and Ugam Singh's⁶ cases, and by different High courts in decisions cited above, have not been strictly adhered to. In bigamy cases⁷ polygamy was not accepted as an integral part of the Hindu religion. The ruling of the Courts left no doubt about the fact that the Courts had pronounced on the matter belonging to essentials of Hinduism, for polygamy was a social result of belief as expressed in religious and other terms.⁸ Again in Hanif Quareshi's case,⁹ the Supreme Court held that slaughtering cows was not an essential of Islam as professed by the appellant Muslims. But in the Shirur Math case,¹⁰ the Supreme Court specifically ruled that the community, not the Court was entitled to decide what rites and ceremonies were essential according to the tenets of its religion.

1. AIR 1971 SC 2540.

2. AIR 1954 SC 282.

3. Ram Prasad v. State of U.P., AIR 1957 All 411 and State of Bombay v. Narasu Appa Mali AIR 1952 Bom 84.

4. ILR (1880) 5 Bom 80.

5. AIR 1961 SC 1720.

6. AIR 1971 SC 2540.

7. AIR 1957 All 411 and AIR 1952 Bom 84.

8. Derrett, RLSI, 447.

9. M.H. Quareshi v. State of Bihar AIR 1958 SC 731. In that case, it was held that sacrifice of a cow on the Bakr-Id-Day was not an "obligatory overt act for a Mussalman to exhibit his religious belief and idea" - per Das, C.J. at 740.

10. AIR 1954 SC 282.

b. The Court and questions of Caste

Though suits filed for the enforcement of one's rights relating to caste are suits of a civil nature, they are not cognizable by the Courts as such.¹ Purely caste questions cannot form the subject-matter of a civil suit,² and this view has been expressed in many decisions of many High Courts in India.³ It is well to recognise at this stage that caste questions were decided by the Hindu kings of the pre-British period.

Before we discuss the judicial treatment of the question, let us find out the meaning of the expression "caste". The description of the word "caste" as given by Farran, J. in Raghunath v. Janardhan,⁴ in which the plaintiff initiated the suit claiming damages and for a declaration that his excommunication by the caste, depriving him of his social privileges such as his right to be invited to dinner, was illegal and the Bombay High Court held that the Court had no power either to compel the other members of the caste to give the defendant dinner or to pay him damages, seems to be the best one as acclaimed by Ragnekar, J. in Nagindas v. Somnath.⁵ Thus his Lordship said that

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1. "During the British Period, the courts generally recognised the autonomy of castes". A. Gledhill, Fundamental Rights in India, Stevens and Sons, London, 1955, 101.
 2. Sir John George Woodroffe and Frank James Mathew, Civil Procedure in British India, second edition, Thacker, Spink and Co., Calcutta/Simla, 1916, 85.
 3. Murari v. Suba ILR (1882) 6 Bom 725; The Queen v. Sankara ILR (1883) 6 Mad 381; Ganapati Bhatta v. Bharati Swami ILR (1894) 17 Mad 222; Abdul Kadir v. Dharma ILR (1895) 20 Bom 190; Cooposwami Chetty v. Duraisami Chetty ILR (1910) 33 Mad 67; Naraindas v. Valabdas AIR 1929 Sindh 1; Ram Dulari Saran v. Yogeshwar AIR 1969 All 68.
 4. ILR (1891) 15 Bom 599.
 5. AIR 1932 Bom 122 (FB), 126. In that case, the plaintiffs belonging to a section of the Lohar caste had filed the suit for a declaration that they were entitled to inspect accounts and the documents of the caste. The Court following Haroon v. Haji Adam (1909) 11 Bom LR 1267 in which the parties belonged to the Cutchi Memon Jamat of Bombay and commenting on it, held that all members of the caste were entitled to inspect account books regarding the management of caste property by its managers.

"The caste is a social combination, the members of which are entitled by birth, not by enrolment. Its rules consist partly of resolution passed from time to time, but for the most part of usages handed down from generation to generation. The caste is not a religious body, though its usages, like all other Hindu usages, are based upon religious feelings. In religious matters strictly so called, the members of the caste are guided by their religious preceptors and their spiritual Heads. In social matters they lay down their own laws. Sumptuary laws are laws that concern social matters in one respect and like all other social laws are liable to be changed from time to time".²

Though we have found a very good description of the expression 'caste', as given by Farran, J., it seems to be difficult to give a definite answer to the question "what is a caste question?" Ragnekar, J. in Nagindas,³ case suggested a workable definition which the learned judge made out of the observation of Ranade, J. in Appaya v. Padappa⁴ concerning a dispute involving parties belonging to two branches of a family of Pujaris of a Jain temple that "I think, a caste question is to use the words of Ranade, J. in Appaya v. Padappa, a question which relates to matters which affect the internal autonomy of the caste and its social relations".⁵

In Ram Dulari Saran v. Yogeswar⁶ the petitioner challenged the right of the fifth defendant called Mahabir Dev, to succeed to Mahantship of a temple at Mohalla Ram Kot, on the ground that he was not a Brahmin, because of his being a member of the non-Brahmin Bhumihaar Community. The main point for consideration was the status of caste in Hindu society. Katju, J. laid down the law on the subject when his lordship spoke for the Allahabad High Court that

1. "A caste being a self-governing body with civil rights and autonomy necessary for its existence, it is vested with certain powers, some of which are, in a sense, judicial, and others are, in a sense, legislative. These powers are not the creation of any legislative enactment, though they are recognised in law, and their nature and extent are mainly dependent upon the custom obtaining in the particular caste" - D.F. Mulla, Jurisdiction of Courts in Matters Relating to the Rights and Powers of Castes, printed at the Caxton Printing Works, Bombay, 1901, 39.

2. ILR (1891) 15 Bom 599, 611.

3. AIR 1932 Bom 122 (FB).

4. ILR (1898) 23 Bom 122.

5. AIR 1932 Bom 122 (FB) 126.

6. AIR 1969 All 68.

"Whether the Bhumihars are Brahmins or not is a question which has to be determined primarily by Bhumihars themselves and relatively the other sections of Hindu Society. The question of caste in the Hindu Society, has always been a matter primarily for the caste itself and for the Hindu Society. All that a Court could do is to recognise what has been declared and decided by the people themselves on the evidence before it. It is true that sometimes a Court has to decide the precise status of a particular caste in a dispute between the parties, but primarily the decision of the Court would deal only with the controversy between the contending parties before it. A Court would neither take upon itself the task of finally and conclusively declaring for all times the status of a particular caste or section of the Hindu Society nor could it expect that its verdict would be the last word on the subject".¹

Though no case law was cited in the present case the learned judge seems to have stated the general law on the subject correctly, and it is markedly at variance with the practice of the state in pre-British times.

In Murari v. Suba,² the plaintiff Murari, a member of the Mahar caste, had instituted the suit to establish his right as guru to certain annual fees from the defendants as his Sishyas (disciples), but the defendants denied that the plaintiff was their guru. Referring to Shankara v. Hanma³ in which the plaintiff claimed to be the hereditary holder of the office of certain position in the Lingiat caste of Bagalkot, Sir Charles Sargent, C.J. of the Bombay High Court had held that

"a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy privileges and honours at the hands of the members of the caste in virtue of such office is a caste question and not cognizable by a civil court; and indeed, we think the same rule ought to apply when there are fees appertenant to the office".⁴

The same learned Judge had held in Abdul Kadir v. Dharma⁵ where the

1. AIR 1969 All 68, 71

2. ILR (1882) 6 Bom 725.

3. ILR (1877) 2 Bom 470.

4. ILR (1882) 6 Bom 725, 727. But/ ^{this view} is now obsolete in view of the provision in Explanation II of section 9 according to which any suit relating to the right to any office, a caste office or not, paid or honorary, is of a civil nature, cognizable by a Civil Court.

5. (1895) 20 Bom 190.

members of a certain caste, came to an agreement to make individual contributions to the caste funds for paying off the debts of the caste and the managers of the caste had instituted a suit against some of its members to enforce the agreement, that

"the agreement referred to in the plaint simply embodies an arrangement come to between members of the caste for the purpose of paying off the debts of the caste out of certain contributions to the caste funds and as such involves a caste question. We must therefore, discharge the rule with costs."¹

It will be appreciated that in refusing to decide caste questions the courts were indirectly strengthening the significance of the power of excommunication in respect of all Hindus (and many Muslims and Christians) who valued (as most of them did) membership of their community.

The aforesaid two cases were often cited in subsequent decisions on the subject. Thus in Mehta Jetulal v. Jamiatram Lalubhai² and Giridhar v. Kalya,³ Sir Charles Sargent had held that as the complaints involved caste questions, the suits were not of a nature cognizable by a civil court. The Assistant Judge in Giridhar's case⁴ referred to the Full Bench decision in Nemchand v. Savaichand.⁵ In Nemchand's case some members of a caste (Shravak caste at Surat) had instituted the suit for a decree declaring them to be the proper persons to receive half of the compensation granted by the Collector to buy certain shops belonging to the same caste. One of the questions as raised by the District Judge was "Is this a caste question with which a court cannot interfere by law?"⁶ The Judge decided the question

1. (1895) 20 Bom 190, 192.

2. ILR (1887) 12 Bom 225.

3. ILR (1880) 5 Bom 83.

4. Ibid.

5. S.A. 591 of 1865 (unreported) see footnote at ILR (1880) 5 Bom 83, 84.

6. ILR (1880) 5 Bom 83, footnote at 84.

in the affirmative and held that

"The question of plaintiff's right to half the temple property is simply a caste question; it is not a right of any individual, nor can it be looked on as affecting the separate individual right of the parties.¹ It is a question solely affecting the well-being of the caste, and as such, I consider the court cannot interfere".²

The ruling of the District Judge was upheld by the Full Bench of the Bombay High Court.

Now it is clear that in cases where the question raised is either entirely a caste question³ or the principal issue in the case is a caste question,⁴ the civil Courts cannot have jurisdiction over them. At this point, it is to be remembered that the law hitherto discussed is the general law in so far as the Civil Procedure Code is concerned. The fact is that the exclusion of caste questions proper is more relevant to the Bombay High Court than any other High Court in India because of sec. 21 of the Bombay Regulation II of 1827 providing inter alia that

"no interference on the part of the Court in caste questions is hereby warranted beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff arising from some illegal act or unjustifiable conduct of the other party".⁵

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1. "Thus a caste may frame rules for the management of its affairs, and for the guidance of its members, and the civil Court has no jurisdiction to enquire into the validity of the rule, provided the punishment for its breach is limited to social caste sanctions" - L.T. Kikani, Caste in Courts. Or Rights and Powers of Castes in Social and Religious Matters as Recognised by Indian Courts, printed at the Ganatra Printing Works, Rajkot, 1912, 15.
 2. ILR (1880) 5 Bom 83, footnote at 84.
 3. Shankara v. Hanma ILR (1877) 2 Bom 470; Raghunath Damodhar v. Janardhan Gopal ILR (1891) 15 Bom 599; Kaji Bavla v. Arjun Shamji ILR (1893) 18 Bom 115; Nathu v. Keshwaji ILR (1902) 26 Bom 174.
 4. Naraindas v. Valabdas AIR 1929 Sindh 1.
 5. See Pragji Kalan v. Govind Gopal ILR (1887) 11 Bom 534, footnote at 535; see also Nathu Velji v. Keshwaji ILR (1902) 26 Bom 174, at 180 as reproduced by Chandavarkar, J.

The spirit of this written law has been accepted by all the High Courts in India except the Calcutta High Court. In so far as the High Court of Calcutta is concerned it is guided by Sec. 8 of the Bengal Regulation III of 1793¹ which empowers a civil Court to take cognizance of all suits including complaints relating to rights connected with a caste.

In Appaya v. Padappa,² it was held that the civil Court had jurisdiction to make inquiry into the validity of the sentence of excommunication.³ In that case, Ranade, J. had cited many cases involving caste disputes proper where the civil Court could not have jurisdiction. Thus his Lordship observed that

"Claims between rival factions of the same caste to common ... property, claims to leadership of caste, claims to require voluntary offerings and honours and presents to be paid to particular members, claims to officiate as priests against the consent of the caste, claims for compulsory invitations to dinners &c. - Girdhar v. Kalys; Dullabh v. Narayan; Murar v. Nagria; Murari v. Suba; Archakam v. Udayagiri; Gossain Doss v. Gooroo Doss; Krishnasami v. Krishnama; Dayaram v. Jethabhat; Maya-Shankar v. Harishankar; Karuppa v. Kolanthoyan; Joy Chunder v. Ramchurn; Sudharam v. Sudharam; Shankara v. Hanma; Striman v. Kristna - These are matters which affect the internal autonomy of the caste and its social relations, and suits in regard to them have been properly held to be barred by Section 21 of Regulation II of 1827 and similar other enactments in other parts of India."⁴

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1. Sec. 8 of the Regulation III of 1793 reads that "The zillah and city courts respectively are empowered to take cognizance of all suits and complaints respecting the succession or right to real or personal property, land-rents, revenues, debts, accounts, contracts, partnerships, marriages, caste, claims to damages for injuries ... and generally of all suits and complaints of a civil nature in which the defendant may come within any of the descriptions of persons &c." See Sudharam v. Sudharam (1869) 3 BLR 91, footnote 2 at 91.
 2. ILR (1899) 23 Bom 122.
 3. The sentence of excommunication was held valid when it was made to maintain the strength of the religion and it was proved that the practice was essentially religious. See Sardar Sydena Taher Saifuddin Saheb v. State of Bombay AIR 1962 SC 853. Also see above.
 4. Appaya v Padappa ILR (1899) 23 Bom 122, 129-130.

→ Galanter's conjecture needs critical approach. Caste is ⁿnot withering away-- since 1966 many things have happened. His prophesy has^{2A} proved to be wrong. Caste system is reasserting; new castes are emerging. Caste is a base and/or identified with economic and political power. One minister (of Bihar) wanted all the secretaries of the ~~same~~ caste.

With due respect to the eminent Judge, it is suggested that the High Court of Calcutta had dealt with the above cited two cases (Sudharam v. Sudharam (1869) 3 BLR 91 and Gossain Doss v. Guru Doss (1896) 16 WR 198), taking into consideration the provisions of the said Bengal regulation of 1793. Suits which would have been barred by the Bombay or other High Courts, had been taken cognizance of by the Calcutta High Court and even suits declaring restoration to caste had been cognized of in Sonaram v. Obhayram Gazor.¹ In that case, the two lower Courts had upheld the claim of the plaintiff that he had been injured in caste when he had been invited to a ceremonial and the defendants turned him out of the assembly. The main issue in the case was the right to regain caste. Though the High Court sent back the case to the lower court for proper disposal, it ordered that a special appeal be admitted.

Caste questions are, no doubt, intermingled with religious questions, but their privilege is not necessarily reconcilable with the needs of the present Indian society.² India to-day needs change but that change, or reform, cannot be brought about without dealing with delicate caste questions. In the Hindu community, the caste system stands as an evil making divisions in the community. Members of the lower castes have every reason to feel deprived of the dignity which the members of the higher castes enjoy. From the humanitarian point of view, the caste system should be abolished, but that can be done only by reforming Hinduism. However, the question is "Can it be reformed?" It is suggested that if reform can be brought about

1. (1847) SDA 106.

2. "Notwithstanding the common rhetoric about the casteless society, the Constitution is quite unclear about the position of the caste group in Indian life. While there are guarantees to preserve the integrity of religious and linguistic groups, there are none for the caste group - it would not seem to enjoy any constitutional protection as such. This silence may represent an anticipation that caste will wither away and have no important place in the new India. Or it may represent an implicit ratification of the old policy of non-interference" - M. Galanter, "The Religious Aspects of Caste: A Legal View" in D.E. Smith (ed.), South Asian Politics and Religion, Princeton University Press, Princeton, New Jersey, 1966, 227-310, 304. ←

in this aspect, the initiative of bringing it should be left to the sāstrīs or the religious pundits. As parliamentarians are not experts in religious matters, they can at best ventilate the needs for a change in a community or communities.

To sum up: where a matter of the Hindu religion is of the substance of a dispute, the first question is whether the State will adjudicate. If a constitutional right is infringed the Courts must provide a remedy. We have seen that the Courts are generous in some respect and are particularly solicitous to prevent the community or any spokesmen for a community interfering with the liberty of another community; yet they are solicitous on the part of the state itself to refuse relief where the pretended or real religious interest would defeat an object which the State holds dear, e.g. reform. On the other hand the present state of Hindu caste discipline is recognized - to confirm the solidarity of caste in its religious aspects the Court will decide no religious question and no caste question unless property right is at stake, while the castes' right to excommunicate members for religious offences is everywhere recognized as a fundamental right so long as castes care to use it or individuals are amenable to it.

We are now in a position to apply our minds to what are ostensibly exclusively property matters, in which the factor of religion is sufficiently prominent for the question to be asked: "Will the state adjudicate so as to protect religious interests, and if so, within what limits and to what effect?"

CHAPTER II

TRUSTS IN ENGLISH AND HINDU LAWS

INTRODUCTION

English judges in British India were generally careful not to interfere with native family laws, but when the texts were silent or principles of a particular system could not give clear guidance, they did not hesitate to draw on English or any other legal principles to meet new situations. The doctrine of Justice, Equity and Good Conscience was introduced to that effect.

"Where the rights of parties are not clearly governed by a particular personal law, where the personal law is silent, where a code has a lacuna, and where the source fails, or requires to be supplemented, J.E.G.C. may properly be referred to".¹

The importance of this doctrine in giving shape to Anglo-Hindu law cannot be overstressed.² Moreover, English laws on different subjects were introduced either to replace native laws or to fill a gap in native legal systems. Thus, the present Indian Penal Code, which was introduced in India in 1860, is a codified English Criminal Law³ and the Indian Trusts Act (Act II of 1882) is based on English laws or Chancery notions on the subject.⁴ Sec. 3 of the Act clearly points to that effect when it provides that

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1. J.D.M. Derrett, "Justice, Equity and Good Conscience in India", in Essays in Classical and Modern Hindu Law (hereafter referred to as ECMHL), vol. 4, E.J. Brill, Leiden, 1978, 8-17, 9.
 2. J.D.M. Derrett, Introduction to Modern Hindu Law (hereafter referred to as IMHL), Oxford University Press, Bombay, 1963, 9.
 3. N.J. Coulson, Succession in the Muslim Family, Cambridge University Press, 1971, 184.
 4. "The Law of Trusts as administered in India closely resembles the English law in the general principles applied" - W.F. Agnew, The Law of Trusts in British India, Thacker, Spink & Co., Calcutta, 1882, 1.

"A trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner ... for the benefit of another ... and the owner ..."¹

The rule against perpetuities or the law of perpetuities as applicable to Hindus or non-Hindus has been incorporated² in several statutes³ and the cy près doctrine has been contained in sec. 92 of the present Code of Civil Procedure as amended in 1976. Both, the rule against perpetuities and the cy près doctrine, have been applied and discussed in cases of both Hindu religious endowments and Muslim religious trusts (wakfs).⁴

The fact that technical ideas of Chancery jurisprudence have been used in cases of law of Hindu religious and charitable trusts and still they are in use, reveals that there are very few materials which Hindu lawgivers might have supplied to tackle the issues raised in connection with the disputes relating to Hindu religious endowments. Thus Pandit Prannath Saraswati observed that

"The actual facts discovered might be very few but in exploring such fields we would be in the position of the geologist patiently sifting the dust of ages in ancient beds, thankful if mere fragments of fossil bones should be discovered ..."⁵

But we have not yet found any fossil; instead we have seen commendable

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1. D.V.Chitale and S.Appu Rao, The AIR Manual, vol.21, 3rd ed., 1974, 343.
 2. B.K. Mukherjee, Hindu Law of Religious and Charitable Trusts, 4th ed., Eastern Law House, Calcutta, 1979, 137.
 3. In sec. 114 of the Indian Succession Act (Act XXXIX of 1925) see P.L. Paruck, Indian Succession Act, 5th ed., N.M. Tripathi, Bombay, 1966, 239 and in sec. 14 of the Transfer of Property Act, 1882, 6th ed., N.M. Tripathi, Bombay, 1973, 110. On this point see also Fazlul Rabbi v. State of West Bengal, AIR 1965 SC 1722, 1727.
 4. For example, the rule against perpetuities has been discussed in M. Kesava Gounder v. D.C. Rajan, AIR 1976 Mad 102 and had been applied in both the Mahomedan law (wakf) cases of Abul Fatah Mahomed Ishaqi v. Russomoy Dhur Chowdry, (1894-95) 22 IA 76 and Fazul Rabbi v. State of West Bengal, AIR 1965 SC 1722. In Fazul Rabbi's case the Supreme Court approved the ruling in Abul Fatah's case that under Mahomedan law a perpetual family settlement as made expressly as wakf was not valid merely on the ground that the settlement contained an ultimate but illusory gift to the poor. In State of Uttar Pradesh v. Bansidhar, AIR 1974 SC 1085 and in Ratilal v. State of Bombay, AIR 1954 SC 388, for example, the Supreme Court discussed the circumstances where the doctrine of cy près could be applied.
 5. The Hindu Law of Endowments, Thacker, Spink & Co., Calcutta, 1897, 13.
- * See Mulla on the Transfer of Property Act, 1882.

observations and judgements on the subject of Hindu religious endowments, as made by both eminent English and Indian judges, giving us a developed law on the subject concerned. The modern law of Hindu religious endowments is essentially a judge-made law¹ and the judges with their English legal background have made a valuable contribution to the subject.² So, it will not be out of place if a discussion of the English Law of Trusts is offered in a nutshell.

SECTION 1. ENGLISH LAW OF TRUSTS

a. Brief History

The invention and development of the notion of the English trust is regarded as the most important exploit of Equity.

"This perhaps forms the most distinctive achievement of English lawyers. It seems to us almost essential to civilization, and yet there is nothing quite like it in foreign law".³

The germ of agency can hardly be distinguished from this branch of English law, the use, trust or confidence. The English word "use" is not derived from the Latin term "usus" but it originates from the Latin term "opus" which according to old French is "os" or "oes". The

"earliest history of the "use" is the early history of the phrase ad opus. Now this both in France and England we may find in many ancient days. A man will sometimes receive money to use (ad opus) of another person; in particular money is frequently being received for the King's use".⁴

The law of trusts has its root in the law of the middle ages and assumed its modern shape and importance in the sixteenth century. It has made its impact to a large extent on both English private and public laws. In

1. Shanti Sarup v. R.S. Sabha AIR 1969 All 248, 264.

2. "It should be noted that the modern Hindu law of religions and charitable endowments is essentially a judge-made law and our courts, including the Supreme Court, are still busy in their endeavour to develop and interpret the law of endowments in our modern context" - P. Diwan, Modern Hindu Law. Codified and Uncodified, 2nd ed., Allahabad Law Agency, Allahabad, 1974, 413.

3. F.W. Maitland, Equity, Cambridge University Press, 1920, 23.

4. Pollock and Maitland, The History of English Law, vol. 2, 2nd ed., Cambridge University Press, 1968, 229.

English legal history

"There was a period when the law of contract was appealed to to explain the origin of society; and there was yet a later period when complete freedom of contract was supposed to be the cure for all social ills of the body politic.. Trusts likewise have, from the sixteenth century onwards, played a part in the development of ... public law, larger and more direct than played by contract".¹

b: Role of the Chancery Court

The modern English trust is the product of the equitable jurisdiction of the Chancellor. The distinctive characteristic of the English trust is the direct result of the unique way in which the principles of equity were developed in England by the Court of Chancery.²

Practice grew up from the early thirteenth century of conveying land for permanent purposes. A landowner was entitled to convey land for different purposes, under an ordinary common law, to persons called feoffees to uses, giving direction to them to hold the land for the benefit of other persons, called cestui que use, who might include the feoffor himself. But the common law refused to recognise uses and it in fact treated the feoffees to uses as the owners of the property disregarding the claims of the cestui que use.³ Inadequacy of the procedure of the Common Law was one of the reasons for its refusal to entertain cases involving breaches of trust. But this refusal led obviously to frauds of the "grossest description".⁴

It was rather disturbing that feoffees to uses could be able to disregard the dictates of good faith and honour. From the early fifteenth century, the Chancellor began to intervene by compelling them to carry out the directions given to them by feoffors for dealing with the land.⁵

1. Sir William Holdsworth, A History of English Law, vol.4, 3rd ed., 2nd impression, Methuen & Co. and Sweet & Maxwell, London, 1973, 408.

2. Ibid.

3. P.H. Pettit, Equity and the Law of Trusts, 4th ed., Butterworth, London, 1979, 10.

4. Sir William Holdsworth, op.cit., vol. 4, 3rd ed., 418.

5. Pettit, op.cit., 4th ed., 10.

"The use has its origin in the insistence of the Chancellor that the feoffees to uses should administer the property in a particular way -- to the use and benefit of cestui que use. Similarly with the trust, "Equity did not say that the cestui que trust was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound¹ to hold the land for the benefit of the cestui que trust"."

The Court of Chancery employed a procedure, suitable to discover and remedy breaches of trust. The Court could summon the parties for examining before it and was in a position to know the facts of those private arrangements to which the origin of uses could be generally traced. Whether

"we look at the ethical principles upon which the Chancellor interfered, or at the procedure of the Court of Chancery, or at its freedom from mixed forms of action, we can see that the Chancellor and his Court were strikingly fitted, as the common law courts were² strikingly unfitted, to assume jurisdiction over the use".

The device of the use made it possible to evade some feudal incidents. According to feudal law, the lord was entitled to a payment in case of an heir's succession to a feudal land and to other dues arising in case of the holding of the land by a minor heir. In the absence of an heir to the feudal land he was also entitled to the right of escheat. Further, the employment of use introduced new methods of conveyancing and helped create new types of interests in land which the common law could not make possible.³

The system of uses was entirely beneficial to small tenants but was totally harmful to the King, because he was the "Lord of all", being a "tenant of none". Henry VIII attacked uses for the restoration of the revenues of the uses and the Statute of Uses, 1535, was introduced to limit them severely. The Statute did not put an end to all uses. For example, after the introduction of the Statute, the creation of equitable interests was possible by imposing a use on a term of years. Again, "what would happen if a second use were imposed? If land were limited to A to the

1. Hanbury and Maudsley, Modern Equity, 10th ed., Stevens & Sons, London, 1976, 15-16.

2. Holdsworth, op.cit., vol. 4, 3rd ed., 419.

3. Hanbury and Maudsley, op.cit., 10th ed., 8.

use of 'B' to the use of C; is it possible to argue that the first use will be executed, and that B will hold the legal estate to the use of C"? Such a solution was reached by 1700 A.D. The second use¹ is regarded as trust. A shorter form which became a settled practice was to omit A, and to make the disposition "unto and to the use of B in trust for C".² The result was the restoration of duality of ownership, "B being the legal and C the equitable owner. The use was in effect, resuscitated under the name of trust."³

c: Definition and Nature of English Trusts

No one has yet succeeded in giving a wholly satisfactory definition of a trust.⁴ "No doubt we should like to begin our discussion with a definition of a 'trust'. But I know not where to find an authoritative definition".⁵ Many legal thinkers including Underhill have made attempts to define a trust and among the many definitions on trust as put forward by them, Underhill's definition has been most widely accepted. He defines trust as

"an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one and any one of whom may enforce the obligation".⁶

But this definition is not wide enough to include trusts for purposes as well.⁷ In other words, charitable trusts are not covered by Underhill's

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1. But the second use, after the introduction of the Statute of Uses, used to have been held void for a long time. For an example, Tyrrel's case, ER73 Rep. (1979) 336 = (1557) 2DY 155A. In that case it had been held that "an use cannot be ingendered of an use". - 337.
 2. Hanbury and Maudsley, op.cit., 10th ed., 8.
 3. Pettit, op.cit., 4th ed., 11.
 4. Lewin on Trusts, 16th ed., Sweet and Maxwell, London, 1964, 3.
 5. Maitland, op.cit., 43.
 6. Underhill's Law relating to Trusts and Trustees, 13th ed., Butterworths, London, 1979, 1.
 7. Snell's Principles of Equity, 27th ed., Sweet & Maxwell, London, 1973, 87 = 28th ed., Sweet & Madwell, London, 1982, 90.

definition. But the definition of a trust as given by Keeton and Sheridan seems to be the most comprehensive one. They define a trust as

"the relationship which arises wherever a person called the trustee is compelled in Equity to hold property, whether real or personal and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed cestui que trust) for some object permitted by law, in such a way that the real benefit of the property occurs, not to the trustee, but to the beneficiaries or other objects of the trust".¹

It is said that three things are "indispensable to constitute a valid trust; first, sufficient words to raise it; secondly, a definite subject; and thirdly, a certain or ascertained object."²

Though it is difficult to give an entirely satisfactory definition of a trust, it is easy to grasp the general idea which is expressed by saying that one person in whom property is vested called a trustee, is compelled in equity to hold the property not for his benefit but for the benefit of another person, called the cestui que trust or for some other purposes. Though the trustee is the legal owner of the trust property, he is only a nominal owner, but the real or the beneficial ownership of the trust property belongs to the cestui que trust.

d: Private and Public Trusts

In English law, trusts have been classified in different ways, but the main division is between private and public or charitable trusts. A private trust is for the benefit of ascertainable individuals. A public or a charitable trust stands for purposes which are treated in law³ as charitable⁴ or for purposes which are for the benefit of the community at large. In

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1. G.W. Keeton and L.A. Sheridan, Law of Trusts, 10th ed., Professional Books, London, 1974, 5.
 2. J. Story, Commentaries on Equity Jurisprudence as administered in England and America, vol. 2, 14th ed., Little, Brown & Co., Boston, 1918, 649.
 3. Charitable "purposes mean purposes which are exclusively charitable according to the law of England and Wales" - H. Picarda, The Law and Practice Relating to Charities, Butterworths, London, 1977, 4.
 4. Hanbury and Maudsley, op.cit., 10th ed., 346.

so far as charitable trusts are concerned the

"Attorney-General represents the Crown as parens patriae in litigation, and the Crown has a prerogative right to protect all charitable trusts. The Attorney-General may institute proceedings against charitable trustees, provided his attention is drawn to abuses and that he thinks the matter suitable for legal proceedings."¹

e. Definition of Charity in English Law

No one has yet been able to produce a satisfactory definition of a charity.² In its widest sense the word "charity" denotes

"all the good affections that men ought to bear towards each other. In its most restricted and common sense it denotes relief of the poor. The word is not employed in either of these senses by the Court, and the legal meaning of the word is neither dependent upon nor conterminous with its popular sense. Before the coming into force of the Charities Act, 1960, a purpose was charitable if it fell within the letter or spirit and intendment of the preamble of the Charitable Uses Act, 1601, and was for the benefit of the public and not merely for the benefit of private individuals."³

However, the starting point for a definition of charity is the statute 43 Eliz. I. C 4 (The Charitable Uses Act, 1601).⁴ The Act was passed for the remedying of abuses which had grown up in the administration of charitable trusts, but the preamble of the Act contained a general catalogue of charitable objects furnishing a guide to the English Courts in determining the legal meaning of charity. The Act was repealed by the Mortmain and Charitable Uses Act, 1888 but the preamble was retained to some extent by S.13(2) of the Act which itself was repealed by the Charities Act, 1960, but sec. 38(4) provides: "any reference in any enactment ... to a charity within the meaning ... of the Charitable Uses Act, 1601 ... shall be construed as a reference to a charity within the meaning which the word bears ... according to the law of England and Wales." Though the preamble is no longer in the

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1. G.W. Keeton and L.A. Sheridan, The Modern Law of Charities, 2nd ed., Northern Ireland Legal Inc., Belfast, 1971, 12.
 2. The position has been succinctly explained by Keeton and Sheridan when they say in the preface of their book that "we are as far away as ever from any satisfactory definition of a charitable purpose".
 3. Tudor on Charities, 6th ed., Sweet and Maxwell, London, 1967, 1.
 4. E.L. Fisch, D.J. Freed and E.R. Schachter, Charities and Charitable Foundations, London Publications, Pamona, New York, 1974, 227.

statute book it serves as the guide to the English Courts. For a trust to be legally charitable, its purposes must fall within the spirit and intendment of the Statute of 1601. "Those purposes are considered charitable which that Statute enumerates, or which by analogies are deemed within its spirit and intendment".¹ In other words, purposes will be regarded as charitable if they are within the equity of the statute² and the question whether a particular trust is of charitable status is a question of law.³

Now, the general rule is that for a trust to be of charitable status it must satisfy three conditions. First, a trust is charitable if it is of a charitable character within the spirit and intendment of the preamble of the Elizabethan Statute. Secondly, in order to be charitable a trust must promote the public benefit.⁴ Finally, a trust is charitable only when it is wholly and exclusively charitable.⁵

The purposes as set out in the preamble of the Statute of Elizabeth are, in modernised English, as follows:

"The relief of aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, schools of learning and scholars in Universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and the preferment of orphans; the relief, stock or maintenance for houses of correction; the marriages of poor maids, the supportation,

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1. Per Sir William Grant M.R., Morice v. Bishop of Durham [1803-13] All ER Rep 451, 454. The view has been reaffirmed in many recent decisions. For example, Scottish Burial Reform and Cremation Society, Ltd. v. Glasgow City Corporation [1967] 3 All ER 215; Re Banfield [1968] 2 All ER 276; Ashfield Municipal Council v Joyce [1978] AC 122(PC).
 2. Incorporated Council of Law Reporting v. Attorney-General [1972] Ch. 73, 87-88. Earlier Leach V.-C had observed (at p. 76) in Attorney-General v. Hellis (1824) 2 Sim & St 67, that "It is not material that the particular public or general purpose is not expressed in the Statute of Elizabeth, all other legal, public organised purposes being within the equity of that Statute".
 3. Royal Choral Society v. Inland Revenue [1943] 2 All ER 101, CA.
 4. Re Cole [1958] Ch. 877, CA, 891.
 5. Morice v. Bishop of Durham (1805) 10 Ves. 522 = [1883-13] All ER Rep.451; Hunter v. Attorney-General [1899] AC 309.

and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes."¹

The catalogue of purposes, as mentioned above, is charitable by statute. but "the legislature did not declare that omitted purposes were not charitable".² The position was best explained by Lord Reid in Scottish Burial Reform and Cremation Society, Ltd. v. Glasgow City Corporation³ in which the main issue was whether the appellants, a non-profit-making company whose main object was to promote cremation in an expensive but sanitary way, were a charity. His Lordship ruled that the

"preamble specifies a number of objects which were then recognised as charitable. But in more recent times a wide variety of other objects have come to be recognised as also being charitable. The Courts appear to have proceeded first by making some analogy between an object mentioned in the preamble and the object with regard to which they had to reach a decision. Then they appear to have gone further, and to have been satisfied if they could find an analogy between an object already held to be charitable and the new object claimed to be charitable".⁴

Again, a trust to be of charitable status is to be determined by the consideration whether a purpose in question falls within the classification of trusts set down by Lord Macnaughten in Income Tax Special Purposes Commissioners v. Pemsel⁵ as later exemplified "by the cases decided in accordance with it".⁶ In that case, the main question for determination was whether the purposes of the trust in question (which was made to apply its income for the purposes of maintaining missionary establishments of the Moravian missions, among heathen nations) were charitable within the provisions of the Income Tax Act, 1842. Lord Macnaughten classified charitable purposes⁷

1. P.H. Pettit, op.cit., 4th ed., 173.

2. Keeton and Sheridan, The Modern Law of Charities, op.cit., 2nd ed., 22.

3. [1967] 3 All ER 215 (HL). *The case was followed and approved in Inland Revenue Commissioners v. McMullen* [1980] 1 All ER 884

4. Ibid., p. 218.

5. [1891] AC 531 = [1891-94] All ER Rep 28.

6. Hanbury and Maudsley, op.cit., 10th ed., 373.

7. The first attempt to categorize charity in Macnaughten's line had been made by Sir Samuel Romilly in 1804 - see B. Nightingale, Charities, Allen Lane, London, 1973, 36.

into four heads¹ when he had observed that

"Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads".²

Lord Macnaughten's classification has been referred to in many decisions³ and has been reaffirmed in Scottish Burial Reform and Cremation Society, Ltd. v. Glasgow City Corporation⁴ by Lord Wilberforce, but his Lordship added three of his comments:

"first, that since it is a classification of convenience, there may well be purposes which do not fit neatly into one or other of the headings; secondly, that the words used must not be given the force of a statute to be construed; and thirdly, that the law of charity is a moving subject which may well have evolved even since 1891".⁵

To come to his decision regarding the question whether a trust is charitable or not, a judge is not affected by the settlor's opinion about the trust. The purpose of the trust must be determined by the Court as was held in Gilmour v. Coates⁶, where a trust fund was held not to be charitable as the trust fund was only meant for contemplative nuns of an association which did not have any activities outside their convent.

Again to determine whether or not the object of an organisation or a society is charitable or not, the cardinal test is whether it stands for the public benefit.⁷ In National Anti-Vivisection Society v. Inland Revenue

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1. The first three classes of charity have been borrowed from Sir Samuel Romily's argument in Morice v. Bishop of Durham (1805) 10 Ves 522, Tudor on Charities, op.cit., 6th ed., 1967, 3.
 2. [1891] AC 531, 583.
 3. For example, See Re Banfield [1968] 2 All ER 276, in which half the residue of the estate was to fund a community for leading a pious life. It has also been applied recently in Ashfield Municipal Council v. Joyce, [1978] AC 12 (PC). In that case the issue was whether the vacant land of the trust used as a car park by church goers was exempt from paying rates payable under the local Govt. Act, 1919 of New South Wales.
 4. [1967] 3 All ER 215, (HL). 5. Ibid., p. 223.
 6. [1949] 1 All ER 848, (HL). The case approved the view as had been expressed in Re Hummeltenberg [1923] 1 Ch. 237. *Visible public benefit is required.*
 7. Re Hummeltenberg [1923] 1 Ch. 237; Re Grove-Grady, Plowden v. Lawrence [1929] 1 Ch. 557.

Commissioners,¹ the appellant society whose main object was the total abolition of vivisection including all experiment on living animals claimed exemption of income tax on its income on the ground that it was an association established for charitable purposes only. Lord Wright approved² the opinion of Russell, J. as he then was, as expressed in Re Hummeltenberg³ that

"If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects, of which the training of poodles to dance might be a wild example. In my opinion the question whether a gift is or may be operative for the public benefit is a question, to be answered by⁴ the Court by forming an opinion upon the evidence before it".

Recreational Charities

Mention must be made regarding one class of charities relating to village halls, recreation grounds, etc. The definition of charity has been extended by the Recreational Charities Act 1958.⁵ But the definition does not restrict the purposes which are already recognised in law as charitable. Under Sec. 1(1) of the Act it is "charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare". Under this category a trust to be charitable must be made both for the public benefit and for the interests of social welfare.⁶ So promotion of social welfare alone is not enough for a trust to be of charitable status under this head.

f. Nature and Scope of English Trusts of a Religious Nature

With reference to such English trusts which fall under the separate head

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| 1. [1947] 2 All ER 217, (HL). | 2. <u>Ibid.</u> , p. 221. |
| 3. [1923] 1 Ch. 237. | 4. <u>Ibid.</u> , p. 242. |
| 5. Snell's <u>Principles of Equity</u> , <u>op.cit.</u> , 27th ed., 149. | |
| 6. <u>Wynn v. Skegness U.D.C.</u> [1966] All ER 336, 345-346, a case which was concerned with a holiday centre for Derbyshire miners, wives and families. | |

of charity (i.e. trusts for the advancement of religion), under Lord Macnaghten's classification it may be pointed out that though the Statute of Elizabeth refers only to the repair of churches as a matter relating to the purposes of religion, many religious purposes have been held, nevertheless, to fall within its spirit and indentment.¹

The Court does not make any distinction between one religion and the other. As long as a religion is not subversive of public morality, it can be the object of a charitable gift.² In Thornton v. Howe³ the testatrix bequeathed by her will all her real and personal estate for the purpose of publishing and propagating the writings of one Joanna Southcott who

"was...a foolish, ignorant woman, of an enthusiastic turn of mind, who had long wished to become an instrument in the hands of God to promote some great good on earth. By constantly thinking of this, it became in her mind an engrossing and immovable idea, till at last she became to believe that her wish was accomplished, and that she had been selected by the Almighty for this purpose."⁴

Sir John Romilly, M.R., pronounced for the Court of Chancery that

"I am of opinion, that if a bequest of money be made for the purpose of printing and circulating works of a religious tendency or for the purpose of extending the knowledge of the Christian religion, that this is a charitable bequest and the Court will, upon a proper application being made to it, sanction and settle a scheme for this purpose... In this respect, I am of opinion that the Court of Chancery makes no distinction between one sect of religion and another. They...are equally bequests which are included in the general term of charitable bequests.

"Neither does this Court, in this respect, make any distinction between one sect and another. It may be that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void. The

1. Pettit, op.cit., 4th ed., 179-180.

2. "In the course of four centuries, the law of charities has moved from the extreme of exclusiveness, in which only gifts for the national church were recognised as charitable, to the position in which any religion, which is not subversive of public morality, is capable of being the object of a charitable gift" - Keeton and Sheridan, The Law of Trusts, op.cit., 10th ed., 162.

3. (1862) 31 Beav. 14.

4. Ibid., p. 18..

general immoral tendency of the bequest would make it void, whether it was to be paid out of pure personalty or out of real estate. But if the tendency were not immoral, and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void or take it out of the class of legacies which included in the general terms charitable bequests."¹

Thornton v. Howe² is good law and it is unquestionably the leading case on the subject of English trusts of a religious nature. The case has been cited with approval inter alia in Bowman v. Secular Society, Limited³ where the House of Lords held the object of the society in question, registered as a company, to promote the principle that human conduct should not be based upon supernatural belief but on natural knowledge, did not render the company incapable of acquiring property by gift and that a bequest upon trust for the society was valid. Thornton v. Howe⁴ was referred to in Re Price⁵ where the testator gave half of her residuary estate to the Anthroposophical Society in Great Britain to be used inter alia by the chairman of the society for carrying on the teachings of its founder, one Dr. Rudolf Steiner; and the Court held that the gift under the terms of the will was a valid charitable gift. But very recent citation of the case with approval has been made in Barralet v. Attorney-General⁶ where the main issue to be decided was whether the objects of the society were for the advancement of religion.

But the most relevant case to Thornton v. Howe⁷ is Re Watson Hobbs v. Smith and Others.⁸ In that case the trust in question was made by a spinster daughter for the publication and distribution to the public of the religious works of her father, H.G. Hobbs. The law as laid down in the decision in Thornton v. Howe was applied in the facts of the case and Plowman, J. observed for the Court of Chancery that,

1. (1862) 31 Beav. 14, 19-20.

2. Ibid.

3. [1917] AC 406 HL.

4. [1943] 1 Ch. 422. 14, 20-21.

5. [1943] 1 Ch. 422.

6. [1980] 3 All ER 918.

7. (1862) 31 Beav. 14.

8. [1973] s All ER 678.

"First of all, as Romilly MR said in Thornton v. Howe, the court does not prefer one religion to another and it does not prefer one sect to another. . .

Secondly, where the purposes in question are of a religious nature - and, in my opinion, they clearly are here - then the court assumes a public benefit unless the contrary is shown. . .

"And thirdly, that having regard to the fact that the court does not draw a distinction between one religion and another or one sect and another, the only way of disproving a public benefit is to show, in the words of Romilly MR in Thornton v. Howe, that the doctrines inculcated are - 'adverse to the very foundation of all religion, and that they are subversive of all public morality'."¹

Now any gift for the advancement of religion in general terms is a charitable gift but many gifts for specific religious purposes, e.g. for the improvement of the services of a church or for the improvement of the fabric of a church, are also held charitable.² A gift made for the maintenance of a churchyard along with the tombs in it is charitable³, but a bequest or gift for the maintenance of a particular tomb in a churchyard is not charitable.⁴

In so far as the trusts of a religious nature are concerned, all religions, Christian or non-Christian, are equally treated in English law. This point was made clear in Neville Estates Ltd. v. Madden,⁵ a case relating to the purchase of three plots of land for the purposes of a synagogue, where Cross, J. pronounced for the Court of Chancery that "As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none."⁶

1. [1973] 3 All ER 678, 688.

2. Keeton and Sheridan, The Law of Trusts, op.cit., 10th ed., 163.

3. Re Pardoe [1906] 2 Ch 184.

4. Keeton and Sheridan, The Law of Trusts, op.cit., 10th ed., 163.

5. [1962] Ch. 832.

6. Ibid., p. 853.

g. Administration of Charities including English Religious Trusts

The law relating to religious and other charitable trusts was brought up to date by the Charities Act, 1960.¹ Before the introduction of the Act there were major problems, inter alia, relating to the narrow limits of the doctrine of cy près which hindered bringing up to date a number of old charitable trusts, the gap between the established charities, and the statutory services of the State and the lack of information on the existing charities.²

The general management of any charity is vested in its trustees.³ However, because of the specific circumstances of charities, e.g. the usual absence of any beneficiary who can enforce the charitable trust and the duration of most of the charities on a perpetual basis, some official bodies are charged to supervise them and to that effect a number of special rules have been made.⁴

Persons and Bodies controlling Charitable Trusts

1. The Charity Commissioners

The Charity Commissioners consist of the Chief Charity Commissioner and other Charity Commissioners, of whom there must be a minimum of three, two of whom must be barristers or solicitors. Though they are appointed by the Home Secretary, they are independent of his department in day-to-day administration.⁵ The general function of the Charity Commissioners as provided in sec. 1(3) of the Charities Act, 1960 is to promote

"the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information and advice on any matter affecting the charity and by investigating and checking abuses."⁶

1. Pettit, op.cit., 4th ed., 203.

2. Hanbury and Maudsley, op.cit., 11th ed., 1981, 496.

3. Snell's Principles of Equity, op.cit., 27th ed., 165. 4. Ibid., p.165.

5. D.B.Parker and A.R.Mellows, The Law of Trusts, 4th ed., Sweet & Maxwell, London, 1979, 215.

6. On this point see Hanbury and Maudsley, op.cit., 11th ed., 496; Snell's Principles of Equity, op.cit., 27th ed., 166; Pettit, op.cit., 4th ed., 204.

But it must be noted that the powers of Charity Commissioners are those of advisers and overseers only, but they "shall have themselves no power to act in the administration of a charity."¹

The Commissioners have powers equal to those of the High Court in charity proceedings, inter alia, for establishing schemes, for appointing or removing charity trustees generally on the application of the charity.² But they are not allowed to exercise their jurisdiction in any case involving among others a special question of law which they may think appropriate for adjudication by the Court. But there are provisions relating to an appeal against an order of the Charity Commissioners to the High Court with a certificate either from the Commissioners or leave of a Chancery Judge.³

Apart from the powers of the Charity Commissioners discussed above, their main powers or functions are, inter alia, to maintain a register of charities, to initiate enquiries regarding charities or a particular charity either generally or for particular purposes, to call for and audit accounts of any charity, to authorise transactions which may be expedient in the interests of the charity.⁴ All these provisions regarding the powers and functions of the Commissioners are provided in secs. 18 and 19 of the Charities Act, 1960.^{4a}

2. The Official Custodian for Charities

The Official Custodian for charities is a public officer; the position was created by sec. 3 of the Charities Act, 1960. Here is a corporation sole having perpetual succession using an official seal.⁵ The property of a charitable trust may be vested in him as a custodian trustee by charity

1. Sec.1 (4) of the Charities Act, 1960.

2. Pettit, op.cit., 4th ed., 206.

3. Sec.18 (11) of the Charities Act, 1960.

4. Snell's Principles of Equity, 27th ed., op.cit., 166.

5. Pettit, op.cit., 4th ed., 208.

However, the situation regarding these matters is not ideal. For the problems arising from the present state of law, see Schlackman Report (1978).

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↑ Compare the concept in Hindu law under prakirnaka (a kind of residuary or miscellaneous jurisdiction of the king), Kane, vol. 3, op.cit, 932; Lingat, op.cit, 237-241.

trustees.¹ But he is simply a custodian trustee; the actual management of a charity lies in the charity trustees.²

3. Visitors

Ecclesiastical and eleemosynary corporations are subject to the jurisdiction of visitors relating to their internal affairs.³ Ecclesiastical corporations stand "for the furtherance of religion and perpetuating the rights of the Church."⁴ They are generally visitable by the Ordinary.⁵

The jurisdiction of visitors covers all matters of internal management including all questions of disputed membership⁶ and complaints by members.⁷ The power of the visitor is absolute in relation to any matter within his jurisdiction and no appeal lies from any of his decisions unless the statutes of a corporation so provide.⁸

4. The Attorney-General

The Attorney-General acts in cases of charitable trusts on behalf of the Crown as ^{ga}parens patriae, and a duty is imposed on him to intervene for the purpose of protection of charitable trusts and affording advice to the Court in the administration of charities.⁹ In Wallis v. Solicitor-General for New Zealand¹⁰ where the main point of determination centred over the grant of land by the Maori chiefs to a certain bishop and his successors, where the Privy Council refused to approve the course adopted by the Solicitor-General for New Zealand in relation to the grant in question, Lord Macnaghten pronounced for the Judicial Committee that

"It is the province of the Crown as parens patriae to enforce the execution of charitable trusts, and it has always been recognised as the duty of the law officers of the Crown to intervene for the purpose of protecting the charities and affording advice and assistance to the Court in the administration of charitable trusts."¹¹

1. Hanbury and Maudsley, op.cit., 11th ed., 496.

2. Parker and Mellows, op.cit., 4th ed., 215.

3. Hanbury and Maudsley, op.cit., 11th ed., 497.

4. Pettit, op.cit., 4th ed., 213. 5. Ibid., p.213.

6. Cf. the role of smarthas in religious enquiry. See below, sec.4 of the 6th Chapter.

7. Hanbury and Maudsley, op.cit., 11th ed., 497.

8. Thorne v. University of London [1966] 2 All ER 338, 339.

9. Pettit, op.cit., 4th ed., 209. 10. [1903] AC 173. 11. Ibid., pp.181-182.

This principle has been accepted by the Charities Act, 1960.¹ It is the Attorney-General who is the only one entitled to take action against supposed trustees for establishing the existence of a charitable trust.² He or the charity trustees are the only persons who can start proceedings to recover the property of the trust from a third person.³ Only the Attorney-General and the Court are empowered to authorise the trustees of a charity to make ex gratia payments out of a charitable trust fund.⁴

5. The Court

The Court has an inherent jurisdiction over charitable trusts; it can enforce them, redress a breach of trust, and direct a scheme for enforcing the attainment of the charitable objects.⁵ It can also take steps to alter and amend the charitable trusts under the doctrine of cy près.⁶ In Attorney-General v. The Governors ... of Sherborne Grammar School⁷ where the school in question was founded and endowed by King Edward the Sixth Sir John Romilly MR observed that the

"Court has authority to redress a breach of trust, where the objects of the founder have been prevented or neglected. It has also authority to direct a scheme, in order to enforce the more complete attainment of those objects. This Court has a further power and authority when the objects contemplated by the founder cannot be carried into effect, to direct the application of the revenues of the charity to promote objects in accordance with the spirit of the original foundation, the actual compliance with which has become impossible."⁸

But the jurisdiction of the Court is based primarily on the existence of a trust⁹, and in a case where a testator has given property by way of trust to an institution which was not in existence, but where it was found that there was a general charitable intention the Court has jurisdiction and will direct a scheme.¹⁰

1. Snell's Principles of Equity, 168.

2. Hauxwell v. Barton-upon-Humber UDC [1973] 2 ALLER 1022, 1032.

3. Ibid., p. 1032.

4. Pettit, op.cit., 4th ed., 209.

5. Pettit, ibid., p.211.

6. Pettit, ibid., p.211.

7. (1854) 18 Beav 256.

8. Ibid., p.280.

9. Pettit, op.cit., 4th ed., 212.

10. Pettit, ibid., p.212.

h. Appointment of Trustees; Removal of Trustees; Schemes

1. Appointment of Trustees

The rules which govern the appointment of trustees of private trusts are generally the same as those governing the appointment of charity trustees.¹ The first trustees are normally appointed by the settlor or the testator creating the trust.² In the case of a trust created by a will the fact that it fails to appoint any trustee or that the trustees appointed predecease the settlor or that the appointed trustees refuse to act, the general rule is that the trust will not fail.³

A trust is held by trustees as joint tenants and if any of the trustees die the survivors are the trustees; they and their successors have the same powers and duties as the original trustees.⁴ On the death of a sole trustee the property vests in his personal representatives who become trustees.⁵ They are entitled to exercise any power which the deceased trustee could have performed as long as the trust instrument does not contain any contrary direction.⁶

There are different ways in which the appointment of trustees may be made.

1 (a) Appointment under an express order.

The trust instrument may confer an express power to appoint new trustees.⁷ The extent of such a power depends on the construction of the words used in a particular instrument⁸ and the power should be construed strictly.⁹

1. Parker and Mellows, op.cit., 4th ed., 220.

2. Hanbury and Maudsley, op.cit., 11th ed., 525.

3. Moggridge v. Thackwell (1803) 7 Ves 36; Re Willis, Shaw v. Willis [1921] 1 Ch 44; Re Armitage, Ellam v. Norwich Corporation [1972] Ch 438; Snell's Principles of Equity, op.cit., 27th ed., 191.

4. Hanbury and Maudsley, op.cit., 11th ed., 525.

5. Ibid., p. 525.

6. Snell's Principles of Equity, op.cit., 27th ed., 192.

7. Hanbury and Maudsley, op.cit. 11th ed., 526. 8. Ibid., p. 526.

9. Stones v. Rowton (1853) 17 Beav. 308; Re Norris (1884) 27 Ch.D 333; Pettit, op.cit., 4th ed., 236.

1(b) Appointment under statutory powers.

Section 36 of the Trustee Act, 1925, confers wide powers for appointing new trustees, but these powers are subject to any contrary provision in the trust instrument.¹ Under this section, in certain circumstances² a new trustee can be appointed, for example, inter alia if a trustee is dead³ or if the trust instrument does not contain any provision for appointing a new trustee.⁴ It may be interjected here that the aim of the Trustee Act, 1925 is to ensure the appointment of new trustees in all events.⁵

Under section 36 an appointment must be made in writing⁶ and it need not be in an instrument executed for that purpose.⁷ The statutory power of appointing a new trustee may be exercised by persons nominated in the trust instrument, the existing trustees, and the personal representatives of the sole surviving trustee.⁸

1(c) Appointment by the Court.

Subsection 1 of section 41 of the Trustee Act, 1925 confers on the Court wide powers of appointing new trustees⁹ in certain circumstances, inter alia, when it is found that it is difficult or impracticable to do so without the assistance of the Court.¹⁰ In the absence of any exceptional circumstances the Court will not exercise its power of ordering an appointment of a new trustee if any advantage can be taken either of a provision in the trust instrument or of a statutory power.¹¹

1. Snell's Principles of Equity, op.cit., 27th ed., 192.

2. Ibid., pp. 192-193; Parker and Mellows, op.cit., 4th ed., 234-235.

3. Hanbury and Maudsley, op.cit., 11th ed., 526.

4. Parker and Mellows, op.cit., 4th ed., 231.

5. Hanbury and Maudsley, op.cit., 11th ed., 528.

6. Snell's Principles of Equity, op.cit., 27th ed., 193.

7. Pettit, op.cit., 4th ed., 242.

8. Parker and Mellows, op.cit., 4th ed., 231.

9. Snell's Principles of Equity, op.cit., 27th ed., 196.

10. Hanbury and Maudsley, op.cit., 11th ed., 529.

11. Parker and Mellows, op.cit., 4th ed., 238.

Under the Mental Health Act, 1959 the Court may make an order appointing a trustee in substitution for a trustee being incapable due to mental disorder within the meaning of the Act.¹

It may be pointed out that before the introduction of the Trustee Act, 1850, the Court had no statutory power of appointing new trustees but the appointment of a new trustee used to be made by the Chancery Court under its inherent jurisdiction to supervise trusts and trustees,² and this jurisdiction can still be validly exercised by the Court, because no legislation has yet taken it away.³ But, practically, the Court does not have to rely on this jurisdiction because of the wide powers given to it by section 41 of the Trustee Act, 1925.⁴

1(d) Appointment by the Charity Commissioners.

The Charity Commissioners have concurrent jurisdiction with the High Court to make an order for appointing a charity trustee⁵ generally only on the application of the charity.⁶ Under section 20(4) of the Charities Act, 1960 they may appoint trustees in certain circumstances, inter alia, where there are no charity trustees, or there is a single trustee, or where it is necessary to increase the number of the trustees for the proper administration of the charity.⁷

Though generally the rules which are applicable to the appointment of trustees of private trusts are the same rules to be applied for the appointment of charity trustees, there is a major exception in that the restriction on the number of trustees imposed by the Trustee Act, 1925 is not applicable to charitable trusts.⁸ Moreover the mode of appointing new trustees of a

1. Hanbury and Maudsley, op.cit., 11th ed., 529-530.

2. Pettit, op.cit., 4th ed., 245-246.

3. Pettit, ibid., p. 246.

4. Pettit, ibid., p. 246.

5. Parker and Mellows, op.cit., 4th ed., 217.

6. Pettit, op.cit., 4th ed., 206.

7. Pettit, ibid., p. 207.

8. Parker and Mellows, op.cit., 4th ed., 220. See also Hanbury and Maudsley, op.cit., 11th ed., 501.

charitable trust seems to be a convenient strategy, for a new trustee in a charitable trust may be appointed at a meeting provided the person presiding signs a memorandum of the appointment or this can be done in a different manner prescribed by the meeting and attested by two witnesses.¹

2. Removal of Trustees

Section 18 of the Charities Act, 1960 empowers the Charity Commissioners to exercise concurrent jurisdiction with the High Court for certain purposes, inter alia, to make order for removal of a trustee.² If the Commissioners are satisfied as the result of an enquiry held under section 6 of the Act that there has been misconduct or mismanagement in the administration of a charity and that it is necessary to act for the protection of the charity, then they may remove a charity trustee. A charity trustee may be removed in specific circumstances, inter alia, when he is responsible for mismanagement or bankruptcy or refuses to act for the charity.³

3. Schemes

A charitable trust does not fail for uncertainty⁴ and under its inherent jurisdiction the Court may make an order for the direction of a scheme, inter alia, to remedy uncertainty in the substance of a trust⁵ or to get rid of some administrative difficulty of the charity.⁶ Such a scheme is not necessarily a scheme (to be applied) for the property cy près.⁷

The Charity Commissioners have the same power as the High Court in establishing schemes relating to the administration of a charity.⁸ Although

1. Parker and Mellows, op.cit., 4th ed., 221.

2. Parker and Mellows, ibid., p. 217.

3. Hanbury and Maudsley, op.cit., 11th ed., 501.

4. Re Gott [1944] 1 All ER 293.

5. Re Bennett [1959] 3 All ER 295.

6. Pettit, op.cit., 217.

7. Pettit, ibid., p. 217.

8. Hanbury and Maudsley, op.cit., 11th ed., 499.

the Court is empowered to establish schemes it may be pointed out that the vast majority of schemes for the administration of charitable trusts are made by the Commissioners.¹ "Much of their day to day work consists of making schemes and orders to help the trustees of charities to administer them more efficiently and make better use of their funds and property."² When the Court directs that a scheme relating to the administration of a charity be established it may refer the matter to the Charity Commissioners for settling the scheme and the order of the Court may direct such a scheme to come into effect without further reference to it.³

To conclude this study it may be pointed out that though the Charity Commissioners are given wide powers e.g. relating to appointing a new trustee or the removal of a trustee for the protection of the charity, subsection 11 of section 18 of the Charities Act, 1960 provides inter alia that an appeal against an order of the Commissioners regarding an appointment or removal may be brought in the High Court either by the charity or the trustees or any person removed from any office by an order (unless he is removed inter alia with the concurrence of the charity trustees) with a certificate of the Commissioners or with the leave of a judge of the High Court attached to the Chancery Division.⁴

SECTION 2. HINDU LAW ON RELIGIOUS AND CHARITABLE TRUSTS

Introduction

In so far as Hindu religious endowments or trusts are concerned, the

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1. Parker and Mellows, op.cit., 4th ed., 217.
 2. Hanbury and Maudsley, op.cit., 11th ed., 499.
 3. Pettitt, op.cit., 4th ed., 218.
 4. Childs v. A-G [1973] 2 All ER 108.

main characteristic which distinguishes them from English charitable trusts is, that in Hindu religious trusts, no dual ownership is involved in the endowed or the trust property. A trustee, in the English senss, is a legal owner of the trust property but the beneficial ownership of that property goes to the person or the purpose for which the trust property is conveyed by the donor. But in a Hindu religious endowment, a property which is dedicated to an idol or the deity (Sanskrit (devatā), called debutter, vests in the deity itself. The dedication signifies "a compendious expression of the pious purposes for which the dedication is designed"¹ and the deity, as representing those pious purposes of the donor, "is the juristic person recognised by law and in this juristic person the dedicated property vests".² So the property of the deity as dedicated to it, is legally owned by it. It must be stressed that the idol as a material image in itself is not the juristic person; it is said to be an exploded theory that the idol becomes a legal person only when it is consecrated and vivified by a religious ceremony called the Pran Pratistha ceremony,³ since the debutter cannot be denied vesting till the ceremony is performed.

Again, in Hindu law the person who looks after or manages the property of the idol and the idol itself, called shebait, is not a trustee as one under an English trust. He is the manager of the dedicated property or the debutter.

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1. Per Jenkins, C.J., Bhupati v. Ram Lal ILR (1910) 37 Cal 128 (FB), 140. The case is discussed in section 3 of this chapter.
 2. Per Ramaswami, J., Jogendra Nath v. Income-Tax Commissioner, AIR 1969 SC 1089, 1092.
 3. Ibid., p. 1091.

"The distinction between a manager or a shebait of an idol and a trustee where a trust has been created is well recognised. The properties of the trust in law vest in the trustee whereas in the case of an idol or a Sansthan they do not vest in the manager or the shebait. It is the deity or the Sansthan which owns and holds the properties. It is only the possession and the management which vest in the manager."²

For the present we shall place a caveat against the word 'only' which is per incuriam.³

In Hindu law, religious endowments or trusts can be either private or public.⁴ But in English law, religious trusts must always be public. In a private Hindu religious endowment, the specified persons only or members of the family are entitled to worship the deity and the bounty is meant in reality for the kith and kin of the settlor.⁵ In other words, in such an endowment the dedication of the property is made nominally for the maintenance or worship of a family idol⁶ and the benefit of the endowment is limited to the members of a particular family or group. But in the case of a public Hindu religious endowment, the dedication of the property is made for the benefit of the general public or a section thereof.⁷

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1. It means religious foundation.
 2. Per Grover, J., Kalanka Devi Sansthan v. M.R.T. Nagpur, AIR 1970 SC 439, 442. In that case the main issue was whether the appellant Sansthan, a private religious trust, could take advantage of the provisions of the Bombay Tenancy and Agricultural Act, 1958, by claiming possession of the land from the existing tenant on the ground of cultivating the land on its own.
 3. See below, Angurbala Mullick v. Debabrata Mullick AIR 1951 SC 293 in sec. 1 of the 4th chapter, pp. 218-219.
 4. M.N. Srinivasan, Principles of Hindu Law, vol. 3, 4th ed., Law Publishers, Allahabad, 1970, 2552. The point will be dealt with in detail in the next chapter.
 5. V.K. Varadachari, The Law of Hindu Religious and Charitable Endowments, 2nd ed., Eastern Book Co., Lucknow, 1977, 20-21.
 6. H.S. Gour, The Hindu Code, 3rd ed., Butterworth, Calcutta, 1929, 1176.
 7. Report of the Hindu Religious Endowments Commission (1960-62), Government of India, Ministry of Law, Delhi, 1962, 32; Deoki Nandan v. Murlidhar AIR 1957 SC 133. In that case, the main point for determination was whether a particular deity was open to the public.

a. Kutta

In the context of this study it may be pointed out that the proposition, as has been brought out in the observations of eminent judges and writers including B.K. Mukherjea to the effect that a trust in the English legal sense of the term, involving dual ownership, was unknown to Hindu law, is without foundation. B.K. Mukherjea observed in his book The Hindu Law of Religious and Charitable Trusts that

"the Trust in its origin was a highly artificial concept which had its foundations upon a dual system of law and a dual system of property which had come into existence in England under peculiar political and historical conditions. You could not naturally expect to find a trust in this form in the Hindu system."²

In Vidya Varuthi v. Balusami,³ a Privy Council case which was related to certain lands belonging to a math (orthodox college) in Madura, Mr. Ameer Ali, delivering the judgement for the Privy Council, observed, that "It is ... to be remembered that a "trust" in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple".⁴

It is submitted that the aforesaid view of B.K. Mukherjea that "you could not naturally expect to find a trust" in an English form and the statement of Mr. Ameer Ali to the effect that a trust in English form was not known to Hindu law, as approved both by Gajendragadkar, J., as he then was, in Zain Yar Jung v. Director of Endowments, AIR 1963 SC 985, 988, and Shelat, J. in Ramachandra v. Shree Mahadeoji, AIR 1970 SC 458, 464, are not true.

In some parts of India (certainly in the Andhra - Orissa regions); there existed a peculiar class of land-tenure called "kutta"⁵ which seemed to be more akin to the Chancery or the English conception of a trust. According

1. Emphasis supplied.

2. 4th ed., Eastern Law House, Calcutta, 1979, 5-6.

3. AIR 1922 PC 123 = (1920-21) 48 IA 302.

4. AIR 1922 PC 123, 126 = (1920-21) 48 IA 302, 311.

5. On Kutta see R.W. Lariviere at Indology and Law (Sontheimer and Aithal ed.), Heidelberg, 1982, 209

to that transaction a

"man takes a house or lands and so on from their original owner and both the profit and the loss therefrom accrue to the tenant-in-kuttā i.e. must be borne by himself and there is a special contractual term to this effect. Moreover - the technical definition of this right proceeds - the tenant, with the aid of the house, lands and so on, carries out the funeral and subsequent religious rites appertaining to the original owner of the property and pays off the debts which he has incurred, and if any balance remains over he may appropriate it, while if there be none it cannot be helped".¹

It was a practice in vogue in Andhra-Orissa areas for persons in poor health or persons who had no sons or grandsons who could help them in the work of their lands or could look after them, to make arrangements for the payment of their debts, the repose of their souls or the maintainance of the necessary oblations to gods and ancestors regularly, to give a part or the whole of their lands to strangers who would have to give an undertaking to see that all the obligations, legal or spiritual, were discharged after their death.

It is true that the tenant-in-kuttā is practically the owner of the land in all but name. The ownership comes to him by the conditional gift, but

"the original owner, the donor, retains so much of his ownership as will serve to prevent alienations in fraud of the stipulations and to recover (vicariously, in the person of the donor's heir) the whole property for default in performing the conditions. There are thus two owners, the property is samānya [i.e. in common], and the tenant-in-kuttā (Skt. Kauttika) cannot alienate validly even with the original owner's assent: the act must be that of the original owner himself".²

So we have found in kuttā an element of dual ownership which is characteristically, to a large extent, similar to the conception of trust,³ involving

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1. J.D.M. Derrett, "Kuttā: A class of Land-tenures in South India", in ECMHL, vol. 1, E.J.Brill, Leiden, 1976, 280-302, 282.
 2. Derrett, ibid., p. 285.
 3. The statement of Mr. Ameer Ali in Vidya Varuthi's case, AIR 1922 PC 123, 126 that the "conception of a trust apart from a gift was introduced in India with the establishment of Moslem rule" is not true. For, the transaction of Kuttā as discussed above, was already there in South India, Andhra-Orissa area. On this point see also Derrett's IMHL, 496, footnote 1.

dual ownership, in the English system.

Now, it should be noted that a trust in the English sense, as distinguished from a Hindu religious endowment, can be created for the benefit of a deity, where the ownership of the trust property vests in trustees.¹ To this effect, Jenkins, C.J., referring to the Tagore case,² observed in Bhupati v. Ram Lal³ that

"this at least seems clear that the rule which requires relinquishment should be to a sentient person does not forbid the gift of property to trustees for a religious purpose, though that purpose cannot in strictness be called a sentient person (Ramtonno Mullick's case)".⁴

The rule was firmly laid down in Sri Sri Sridhar Jiew v. Manindra Kumar.⁵ In that case one of the main points for decision was whether there could be a trust in Hindu law in the sense as expressed in English law, where properties vested in trustees and it was held by the Calcutta High Court that trusts in the English sense had been recognised and administered in the Indian Courts.

b. Religious purposes and Charity under Hindu Law

Neither the Statute of Elizabeth⁶ nor the Mortmain and Charitable Uses Act⁷ as amended in 1891, as abolished by the Charities Act, 1960 or the

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1. N.R. Raghavachariar, Hindu Law, Principles and Precedents, 6th ed., M.L.J. Office, Madras, 1970, 654.
 2. (1872) 9 BLR 377 = IA Sup. Vol. 47.
 3. ILR (1910) 37 Cal.128.
 4. ILR (1910) 37 Cal.128 (FB) 140.
 5. ILR (1940) 2 Cal.285.
 6. As stated in the argument of the appellant's counsels in Runchordas Vandrawandas v. Parvatibhai (1899-99) 26 IA 71, 75; B.K. Mukherjee, op. cit., 4th ed., 73.
 7. Mortmain - "Mortmain signifies an alienation of lands and tenements to any guild, corporation or fraternity, and their successors; e.g. bishops, parsons, vicars, etc.... The common modern use of "Mortmain" counts land alienated to, or for the purposes of a CHARITY".
 "The chief statutes of Mortmain are 7 Edw 1; Charitable Uses Act, 1736 (c.36); Mortmain and Charitable Uses Acts, 1888 (c.42); 1891 (c.73)." Stroud's Judicial Dictionary, vol.3, 4th ed., Sweet and Maxwell, London, 1973, 1711.
 "The "English Law of Mortmain" does not extend to India" - per Davar, J., Jamshedji C. Tarachand v. Soonabai, ILR (1909) 33 Bom. 122, 188.

law relating to superstitious uses and trusts¹ (i.e. the law that holds disposition of real or personal estate for propagating religious rites, not sanctioned by law, void)² has no application in Hindu law.

But for a long time the

"Courts in India have...adopted the technical meaning of charitable trusts and charitable purposes which the Courts in England have placed upon the term 'charity' in the Statute of Elizabeth, and therefore, those which according to English law are charitable will be charitable under Hindu law,.... there are other purposes in addition which are recognised as charitable purposes. Hence, what are purely religious purposes and what religious purposes will be charitable purposes must be decided according to Hindu notions and Hindu law".³

In Fatmabibi v. Advocate-General of Bombay,⁴ a case where the main question for determination was whether the plaintiff could revoke the trusts (wakfs) declared already by an indenture, West, J., approving the view expressed earlier in Khushalchand's case⁵ pronounced that in determining whether a particular purpose was charitable, the Courts

"must in general, apply the standard of customary law and common opinion amongst the community to which the parties interested belong. Objects which the English law would possibly regard as superstitious uses, are allowable and commendable according to Hindu law. Khushalchand v. Mahadevgiri, 12 Bom. H.C. Rep. 214."⁶

In Saraswati Ammal v. Rajagopal Ammal⁷, where the main question for determination was whether a dedication for a tomb was a Hindu religious purpose, the Supreme Court held that

"It cannot...be disputed that under Hindu law religious or charitable purposes are not confined to purposes which are productive of actual or assumed public benefit. The acquisition of religious merit is also an important criterion."⁸

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1. Khushalchand v. Mahadevgiri (1875) 12 BHCR 214. In that case, a grant had been made to one Rajendragiri, disciples and their successors for generation after generation mainly for the purpose of worshipping the goddess of wealth and it was observed there that "Objects...might according to English notions, be deemed superstitious uses are allowable and commendable in Hindu law" - 216.
 2. Jowitt's Dictionary of English Law, vol.2, 2nd ed., Sweet and Maxwell, London, 1977, 1725.
 3. Per Shelat, J., Ramachandra v. Shree Mahadeoji AIR 1970 SC 458, 464. In that case, the main point for determination was whether the trust in question was a valid Hindu religious trust.
 4. ILR (1881) 6 Bom 42.
 5. (1875) 12 BHCR 214.
 6. ILR (1881) 6 Bom 42, 50.
 7. AIR 1953 SC 491.
 8. Per Jagarnadhadas, J., ibid., p.494.

In so far as Hindu law is concerned, there is no difference between religious and charitable purposes.¹ "In the Hindu system there is no line of demarcation between religion and charity. On the other hand, charity is regarded as part of religion."²

A religious endowment³ to be valid in Hindu law, must have valid objects or purposes as well. In Nagu Reddiar v. Banu Reddiar⁴ in which the main issue was whether raising a samādhi was an object of charity, Kailasam, J., speaking for the Supreme Court held that "what are purely religious purposes and what religious purpose will be charitable must be entirely decided according to Hindu law and Hindu notions."⁵ The Court, in the same case, following the rules as laid down in the Saraswati Ammal case⁶ ruled that

"In Saraswati Ammal v. Rajagopal Ammal ... it was held that the determination of what conduces to religious merit in Hindu law is primarily a matter of Shastric injunction and therefore any purpose claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, must be shown to have a Shastric basis so far as Hindus are concerned."⁷

Now, in my opinion, in deciding the question whether a particular purpose is religious or not, the Courts instead of giving stress on what Sastris say about it,⁸ should look for the prevalent belief or practice of the

1. S.M.N. Thangaswami v. I-T Commr., Madras, AIR 1966 Mad 103.

2. B.K. Mukherjea, op.cit., 4th ed., 11.

3. "Endowment is dedication of property for purposes of religion or charity having both the subject and objects certain and capable of ascertainment." - N.R. Raghavachariar, op.cit., 6th ed., 646.

4. AIR 1978 SC 1174.

5. Ibid., p. 1177. On this point see Varadachari, op.cit., 2nd ed., 9; Mayne's Treatise on Hindu Law and Usage, 11th ed., Higginbotham & Co., Madras, 1950, 912; S.V. Gupte, Hindu Law in British India, 2nd ed., N.M. Tripathi, Bombay, 1947, 828.

6. AIR 1953 SC 491.

7. Per Kailasam, J., 1179.

8. In Saraswathi Ammal v. Rajagopal Ammal, AIR 1953 SC 491, see below, this section, the Supreme Court (at p. 495) accepted that there might be Hindu beliefs and practices without śāstric basis.

community also.¹ Today, Hindus in general do not believe in sati or accept the idea of devādasīs (dancing girls), in spite of the fact that they are of śāstric basis.² So ~~what the~~ people say, what they think about a purpose, in short, what they believe in currently should be the guiding factors for a Court in reaching its decision about whether a particular purpose is religious or not. If by this criterion the trust is religious, the Court will enforce it.

c. The scope of Dharma

Before we go into the details of the controversial issue whether a bequest or a gift for dharma or for that of samādhi is void for uncertainty or otherwise, let us find out what the concept of dharma really means.

d. What is Dharma?

The ultimate basis of Hindu law is the dharmaśāstra³, which is again elaborated from the dharmasūtras dealing with instructions for governing the different varnas (castes) under āśramas (stages).⁴ Dharma is the subject-matter of the dharmaśāstra⁵ which

"is a comprehensive code to regulate human conduct in accordance with the unalterable scheme of creation, and to enable everyone to fulfil the purpose of his birth. The whole life of man, considered as an individual and as a member of groups

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1. Criticising the narrow view of religion taken by Chagla, C.J. and Shah, J. of the Bombay High Court in Ratilal v. State (1953) 55 Bom LR 86 and referring to the decision of the Supreme Court in the same case, Ratilal v. State of Bombay, AIR 1954 SC 388, in appeal which rejected the narrow Bombay view of religion, Derrett comments that "It is no wonder that the Supreme Court put the matter straight, and incidentally made it clear that the ultimate test of what is religious, though within the court's jurisdiction, is to be applied to materials furnished by the community or sect itself: the court does not force any religious group to express its beliefs in a form predetermined by the law". RLSI, 465; emphasis mine.
 2. Derrett, ibid., p. 103.
 3. J.D.M. Derrett, Hindu Law: The Dharmasastra and the Anglo-Hindu Law - scope for further comparative study, Ferdinand Enke Verlag, Stuttgart, 1956, 202.
 4. U.C. Sarkar, Epochs in Hindu Legal History, 1st ed., Vishveshvaranand Vedic Research Institute, Hoshiarpur, 1958, 20.
 5. Derrett, RLSI, 100.

(small and large) as well as man's relation to his fellow men, to the rest of animated creation, to superhuman beings, to cosmos, generally and ultimately to God come within the purview of Dharmaśāstra. Among the duties it lays down are both selfregarding and altruistic, those to the living and to the dead, those who are alive and those who are yet to be born."¹

The dharmaśāstra is regarded as the Indian classical science of righteousness, dharma² and every Indian Hindu ideal must be consistent with dharma, or righteousness,³ which has no fixed content, i.e. dharma is relative to caste and āśrama.

The concept of dharma can be described but it cannot be easily defined. "Dharma is one of those Sanskrit words that defy all attempts at an exact rendering in English or any other tongue. That word has passed several vicissitudes".⁴ Even in the consistent style of the Code of Manu, the word is used in many different ways. Thus in Book 1. 98 of the Manusmriti, it is said that "the very birth of a Brahmana is an eternal incarnation of the sacred law (dharma); for he is born to (fulfil) the sacred law, and becomes one with Brahma".⁵ Again in Book 4.239, the term has been used in a different sense, "For in the next world neither father, nor mother, nor wife, nor sons, nor relations stay to be companions; dharma alone remains".⁶ But the general meaning of the term can be

1. K.V. Rangaswami Ayyangar, Some Aspects of the Hindu View of Life According to Dharmaśāstra, Oriental Institute, Baroda, 1952, 62.

2. Derrett, IMHL, 2.

3. J.D.M. Derrett, "Social and Political Thought and Institutions", in A.L.Basham (ed.), A Cultural History of India, Oxford University Press, 1975, 124-140, 127.

4. P.V. Kane, History of Dharmasastra, vol. 1, pt. 1, 2nd ed., B.O.R.I., Poona, 1968, 1.

5. Bhāruci's Commentary on the Manusmriti, translated by J.D.M. Derrett, vol. 2., Franz Steiner Verlag, Wiesbaden, 1975, 2.

6. Ibid., p. 9.

found in its Sanskrit root dhr,¹ meaning to uphold,² to support,³ to nourish. Thus Lingat observes that the

"most general sense is provided by its root, dhr, which signifies the action of maintaining, sustaining, or supporting and which has produced 'fre' in Latin (fretus, depending upon, daring to) and fir (firmus, strong in the physical and moral sense whence solid, hard, durable). Dharma is what is firm and durable."⁴

The concept of dharma as applied to the universe means the eternal law which regulates and maintains the world. The

"unbroken tradition of Hindu legal scholarship has been to emphasise the concept that the Hindu law concerns itself with eternity and with morality judged against the greater background, and not with the material, temporal considerations."⁵

Though the word 'dharma' passed different stages carrying different meanings, it became significant when it covered privileges, duties and obligations of man as a member of his caste and community.⁶ Thus the concept transformed Hindu law as a code of duties, but that does not mean that specific rights, e.g. father's right against the person and property of his son, were not known to Hindu law.⁷

e. Bequests for dharma and the like

In Hindu law, the word "dharma" as used in gifts and bequests means the ishta (Skt. ista) and pūrta gifts.⁸ Saraswati had observed

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1. Kane, op.cit., vol. 1, pt. 1, 2nd ed., 1.
 2. It is in the sense of the action of upholding that the word "dharma" has been used in the Rgveda I. 187.1 ... See R.T.H. Griffith, Hymns of the Rigveda (translated), vol. I, E.J. Lazarus & Co., Benares, 1889, 323.
 3. It has been used as meaning support in the Rgveda X 92.2. Griffith, ibid., vol. 4, 1892, 296.
 4. R. Lingat, The Classical Law of India, translated from French into English by J.D.M. Derrett, University of California Press, Berkeley and London, 1973, 3.
 5. J.D.M. Derrett, "Religion and Law in Hindu Jurisprudence." AIR 1954 Jnl., 79-84, 80.
 6. K.R.R. Sastry, Hindu Jurisprudence, Eastern Law House, Calcutta, 1961, 5.
 7. U.C. Sarkar, op.cit., 1st ed., 21.
 8. Rangrao Bhagwan v. Gopal Pundik (1958) 60 Bom LR 675, 677. In that case, the will in question was contended by the plaintiffs on one of the grounds that it was void for uncertainty. On the question of dharma as related

(continued on next page)

"From very ancient times the sacred writings of the Hindus divided works productive of religious merit into two divisions named ishta and purтта, a classification which has come down to our own times. So much so that the entire objects of Hindu endowments will be found included within the enumeration of ishta¹ and purтта² works."³

Approving the view of Saraswati, Subrahmania Ayyar, J., in his judgement in Parthasarathy Pillai v. Thiruvengada Pillai,⁴ a case in which the direction in the charitable bequest in question was that the executors could utilise the properties for dharman (dharma) if the daughter of the settlor died before attaining majority, pronounced that "in connection with gifts of property", the word "dharma" "has a perfectly well-settled meaning. In that context the word denotes objects indicated by the terms ishta and poorta."⁵

At present, except in certain states,⁶ bequests for dharma or words of similar import, without specifying any objects, are void for uncertainty. This disturbing position of the law on the subject is due to the controversial decision in Runchordas Vandrawandas v. Parvatibhai.⁷ In that case,

(continued from previous page)

to gifts, the judgement referred to Parthasarathy Pillai v. Thiruvengada Pillai, ILR (1907) 30 Mad 340. The same view was held by A.S. Nataraja Ayyar in "Dharmo Rakshati Rakshitaha", Vyavahara Nirnaya, Delhi, vol. 4 (1955), 65-96, 88.

1. The word ishta refers to gifts "to include the sacrifice as well as the sacrificial gift." Pandit Prannath Saraswati, The Hindu Law of Endowments, Thacker, Spink & Co., Calcutta, 1897, 19.
2. The definition of purтта covers gifts made not for the purposes of sacrifice but for construction of works relating to the storage of water, tanks, wells, temples for gods, the relief of the sick, etc. Ibid., p.27; purтта gifts mean charities. Mayne's Hindu Law, op.cit., 11th ed., 912.
3. Saraswati, op.cit., 18.
4. ILR (1907) 30 Mad 340.
5. Ibid., p. 342.
6. Sec. 10 of the Bombay Trusts Act, 1950 provides that "a public trust shall not be void, only on the ground that the persons or objects for the benefit of whom or which it is created are unascertained or unascertainable. Explanation: A public trust created for such objects as dharma, dharmada or punya-karya, punya-dan shall not be deemed to be void, only on the ground that the objects for which it is created are unascertained or unascertainable. Sec. 3 of the Rajasthan Public Trusts Act, 1959 follows Sec. 10 of the Bombay Act verbatim except an omission of the word "punya-dan" in the explanation clause of Sec. 10, the Bombay Act.
7. (1898-99) 26 IA 71.

the main submission of the plaintiff that "the bequests in the will for dharam were void"¹ was upheld by the Privy Council when it ruled that the "objects which can be considered to be meant by that word are too vague and uncertain for the administration of them to be under any control".² The ruling of the Privy Council has been subject to severe criticism in different judgements, especially by Hindu judges of some High Courts, but the rule holds good in so far as decisions³ on the subject of some High Courts are concerned.

It may be pointed out that before the decision of the Privy Council, Farran, C.J. of the Bombay High Court in Vundravandas v. Cursonadas,⁴ (which went up in appeal as the Privy Council case discussed above), pronounced his opinion about a bequest for dharma. In spite of being bound by the law as laid down in Advocate-General v. Damothar,⁵ Pranjivandas Tulsidas v. Devkuvarbai⁶ and other cases⁷ of the Bombay High Court, that a devise in dharma was void for uncertainty, his Lordship suggested in his judgement that the law on the subject

"shall have been expounded by a superior tribunal. It is doubtless the case that this interpretation of the law defeats, in innumerable instances, the cherished wishes of the Hindu testator. Few Hindu wills, that we have met with, are without a devise of this nature, though some testators define with precision the objects of their dharam, and it may well be that the Court would have acted with more regard to native feelings and ideas if, instead of considering the broad signification that the word "dharam" indisputably bears, which appears to be as wide as the words philanthropy, or piety, or charity, in its untechnical sense, they had considered objects which the Hindu Shastris and Hindu testators would consider to be embraced within the term and construed

1. (1898-99) 26 IA 71, 80.

2. Per Sir Richard Couch (1898-99) 26 IA 71, 81.

3. For example: the Patna High Court followed the decision of the Judicial Committee and applied in Mohan Lal v. Habibullah, AIR 1963 Pat 430 where it was held that a bequest to charity for salvation was void for vagueness.

4. ILR (1897) 21 Bom 646.

5. (1852) Perry's Oriental Cases 526 as cited in ILR (1897) 21 Bom 646, 665.

6. (1862-65) 1 BHCR 76, footnote

7. A very old case on the point is Sibchunder Mullick v. Soondry Dosee (1842) Fulton's Rep. 98 as cited in the Runchordas' case (1898-99) 26 IA 71, 76.

it in reference to the Hindu sacred law relating to dharam."¹

With acute satisfaction B.K. Mukherjea comments on this statement that "I cannot help expressing my appreciation for the imagination and wisdom which are evident in these observations."² It is submitted that the observations of Farran, C.J. reflect the correct view of the law on bequests of dharma, which has been given recognition in different High Court judgements as discussed below.^{2a}

In Parthasarathy Pillai v. Thiruvengada Pillai,³ the sole question to be determined was the interpretation of the word "dharma" as contained in the terms of the bequest in question. Disagreeing with the decision of the Privy Council, and citing many authorities on Hindu law in his dissenting judgement, Subrahmanya Ayyar, J. observed that "There can, it seems to me, be no doubt that the word 'dharma' is a compendious term referring to certain prescribed classes of pious gifts ... and that it is not a mere vague and uncertain expression."⁴ In Bhupati Nath v. Ram Lal⁵ where the decision was concerned not directly with the interpretation of the word 'dharma' but with a bequest for the establishment of an image and the worship of a Hindu deity after the death of the testator, Sir Asutosh Mookerjee referring to the decision in Runchodras Vandrawandas v. Parvatibhai⁶ pronounced that

"in that particular instance there is room for doubt whether the actual decision was, in view of the texts to which attention was invited by Sir Subrahmanya Ayyar in Parthasarathy Pillai v. Thiruvengada Pillai quite in harmony with the true doctrine of Hindu jurisprudence."⁷

It may be interjected here that in coming to its conclusion the Privy Council referred inter alia to the meaning of the term 'dharma' as given in Wilson's Dictionary meaning 'law, virtue, legal or moral duty'⁸ and

1. ILR (1879) 21 Bom 646, 665-666.

2. Op.cit., 4th ed., 117.

2 a.

3. ILR (1907) 30 Mad 340.

4. Ibid., p. 344.

5. ILR (1910) 37 Cal 128 (FB).

6. (1898-99) 26 IA 71.

7. ILR (1910) 37 Cal 128 (FB), 161.

8. Mukherjee, op.cit., 4th ed., 117.

2a. In Comm. I.T., Delhi v. Bijli Cotton Mills (1979) 1 SCC 496 even the Supreme Court held that a dharmada (dharma) surcharge on sales, creating a trust for charity (exempt from Income-tax) was not void for vagueness and uncertainty.

with reference to that context B.K. Mukherjea comments that

"With all respect to the Judicial Committee of the Privy Council, it may be pointed out, that the dictionary meaning of the word "charity" is equally wide and indefinite; but what the English Judges proceed upon is not the dictionary meaning of the word, but the technical meaning that it has come to acquire on the basis of the Statute of Elizabeth. As Farran, C.J. rightly pointed out, it is not impossible to lay down with definiteness what 'dharma' means and includes according to the Hindu scriptures and the list of objects included in it would not certainly be more extensive than the list of charities under English law."¹

In Brij Lal v. Narain Das² where the will in question contained directions to spend the trust funds on three accounts, namely dharmarth (dharma), a dharmashala and Sanskrit education, Jailal, J. approving the view of Subrahmania, J. as expressed in relation to the word "dharma", referring to the decision of the Privy Council and the decision of the Chief Court of the Punjab in Gurdit Singh v. Sher Singh (78 PR, 1912) observed that

"I am bound to follow their authorities, though not without some hesitation. It seems to me, that the true significance of the expression 'dharamārth' as understood among the Hindus has not been fully taken into consideration. I am in this respect fortified by the view of the learned Judges of the Madras High Court in Parthasarathy Pillai v. Thiruvengada Pillai and respectfully agree with the opinion expressed by Subrahmania Ayyar, J. as to the real meaning of the dharmarth."³

But the most moving appeal for widening of the Court's jurisdiction for entertaining trusts formerly held vague by the Privy Council, was made by A.S. Nataraja Ayyar when he pointed out that

"This decision is considered unique by judges like Sir Asutosh Mookerji in ILR 3 Calcutta 128 and by text-writers like Srinivasa Ayyangar in his version of Mayne's Hindu Law and Kane in his History of Dharma Sastra and Bijan Kumar Mukherjea in his Law of Hindu Religious and Charitable Trusts. We might add that the Mimamsa Sastra has held that Dharma stands for the acts like yoga ... gifts ... and for Dana ... in general. Popular usage is also quoted by the Mimamsa Sastra."⁴

But it has become clear for a long time that in the case of a bequest containing terms like dharma or similar words, the Court can appoint

1. Mukherjea, ibid., p. 118.

2. ILR (1933) 14 Lah. 827.

3. Ibid., p. 832.

4. "Dharmo Rakshati Rakshitaha", op.cit., 88.

trustees for spending the income or wealth of the bequest on an object which is regarded as dharma according to the religion directed by the testator. As the old authorities do not represent the true position of the law, the judiciary of the states, which have not yet changed the law, may well follow the correct position disregarding the old view on the subject.

"To do differently would be to maintain the present unsatisfactory distinction between gifts to an institution and gifts for a purpose. At present gifts to an existing institution, however absurd, corrupt, or useless cannot be hindered. But a gift nominally for a charitable purpose (and a religious purpose is a charitable purpose if it has a public element, as is generally accepted) can be refused recognition unless the purpose is admitted as unquestionably charitable, complete with the requirement of public benefit. The whole question needs much more careful thought."¹

Bequests to God

At present a general bequest for the worship of God like a bequest for dharma without specifying an object stands on the same footing. In Chandi Charan v. Haribola,² the document in question under which the endowment was to have been established, conveyed property to one Shantiram Bairagi for the purpose of serving (seva) of God. In that case, the High Court of Calcutta following Phundan Lal v. Arya Prithi Nidhi Sabha³ had laid down the rule that "under the Hindu system of law, a general endowment for the worship of God, without giving the name of the deity for whose benefit the endowment is to take effect, is not valid".⁴

But in Veluswami Goundan v. Dandapani⁵ where though the decision was not directly related to the question whether a general bequest to God without naming any deity was valid, Patanjali Sastri, J. rejecting the views as expressed in the aforesaid decisions of both the Calcutta and the Allahabad High Courts, remarked obiter to the effect that a

1. J.D.M. Derrett, A Critique of Modern Hindu Law (hereafter referred to as Critique), N.M. Tripathi, Bombay, 1970, 235.

2. ILR (1919) 46 Cal 951. 3. ILR (1911) 33 All 793. 4. ILR (1919) 46

5. ILR (1947) Mad 47.

Cal 951, 954.

general bequest to God was valid. Thus the learned Judge observed that

"a gift for "the worship of God" discloses a general charitable intention and the Court can apply the doctrine of cy pres upholding the gift as a public trust, even where it is not possible to ascertain with any degree of certainty how the donor intended the trust to be carried out."¹

In Jogendra Nath Naskar v. Commissioner of Income-tax² where the main issue to be decided was "Whether a Hindu deity can be treated as a unit of assessment under sections 3 and 4 of the Income-tax Act, 1922"³ the Supreme Court explained and accepted the concept of Hindu deity and that of God. It made clear that the worship of various gods is in effect the worship of God. Ramaswami, J. speaking for the Court, observed that

"It is a basic postulate of Hindu religion that different images do not represent different divinities, they are really symbols of One Supreme Spirit and in whichever name or form the deity is invoked, the Hindu worshipper purports to worship the Supreme Spirit and nothing else."⁴

The above observation of Ramaswami, J. is in effect the ruling made obiter in the judgement of Patanjali Sastri, J. as he then was, in Veluswami's case⁵ that the

"notion that Hindus worship only particular deities and not one Supreme Being is not correct. It might seem pedantic to refer at length to Hindu scriptural texts to show that the idea of one God is a basic creed of the Hindu faith, but we may perhaps, be excused, under the circumstances, for referring to the well known verse in the Vishṇusahasraṇāma, often recited on various ceremonial occasions among Hindus which says that 'Vishnu, the one Supreme Being, the Great Soul and Ruler of the Universe, pervades the three worlds and protects countless beings of different species'."⁶

It is a pity that in explaining the Hindu concept of God, the Supreme Court, in that case did not refer to the admirable observation of Patanjali Sastri, J., or to indeed any reputable Hindu theologian.

1. ILR (1947) Mad 47, 57.

2. AIR 1969 SC 1089.

3. Ibid., p. 1090.

4. AIR 1969 SC 1089, 1093. See below, sec. 1 of the 3rd Chapter.

5. ILR (1947) Mad 47.

6. Ibid., p. 56.

It is submitted that general bequests for 'God' are not too vague to be given effect to by the Courts. In giving effect to such bequests, now the Courts can be fortified by the ruling of the Supreme Court on the Hindu concept of God as expounded along the lines suggested by Patanjali Sastri, J.

Bequests for raising samādhis or tombs

In so far as the law is concerned, it is settled that bequests for raising samādhis or tombs or provisions in a bequest for worshipping thereat are invalid.¹ But whether this is good law, is a debatable issue. Before we go into the details of the discussion it should be remembered that the conservative approach by the judiciary of India will not solve the problems in dealing with the question of the validity of a bequest providing the raising of a samadhi or tomb over the remains of one's ancestor. Whether or not a particular object is religious is not to be determined merely by what the judges think about it. The "correct test to apply is that of usage, proved in evidence by witnesses in Court or by affidavit".² Custom may be hard to create ex nihilo, but not religion, which can crop up spontaneously as with the celebrated New Religion³ of Japan

In Saraswati Ammal v Rajagopal Ammal⁴ the settlor was buried and

1. Kunhamutty v. Ahmad Musaliar AIR 1935 Mad 29; Draiviasundaram v. Subramania AIR 1945 Mad 217; Veluswami v. Dandapani AIR 1946 Mad 485; Saraswati Ammal v. Rajagopal Ammal AIR 1953 SC 491; Rangrao Bhagwan v. Gopal Pundik (1958) 60 Bom LR 675; R.K. Karuppanan v. V.P. Tirumalai AIR 1962 Mad 500; Sundara Kothanar v. Sellam Pillai (1969) 1SCWR 699; Gangapalli Moorthanna v. G. Chinna Ankia AIR 1975 AP 97; Nagu Reddiar v. Banu Reddiar AIR 1978 SC 1174.

2. J.D.M. Derrett, "The Definition of Religion in Indian Law, (1959) 61 Bom L.R. Jnl. 17-23, 22.

3. For example, Soka Gakkai. For its ideals and basic doctrines see D. Ikeda, A Lasting Peace, 1st ed., Weatherhill, New York/Tokyo, 1981, 235-249.

4. AIR 1953 SC 491.

entombed according to his wishes and a person was appointed to conduct worship at his samādhi. In that case, the main question was whether the properties were dedicated for religious purposes or whether perpetual dedication of property for worship at a samādhi was valid among Hindus. The Court ruled in the negative;

"what conduces to religious merit in Hindu law is primarily a matter for sastric injunction. To the extent, therefore, that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, it must be shown to have a sastric basis so far as Hindus are concerned."¹

In Sundara Kothanar v. Sellam Pillai² the issue in question was whether the suit property was dedicated for the purpose of worshipping the idols installed in a samādhi or maintaining the samadhi itself. Accepting the finding of the lower Court that the dedication was meant mainly for maintaining the samādhi the Supreme Court following Saraswati' Ammal's case³ held that "a perpetual endowment of property for the purpose of samadhi kainkaryam, i.e. worship of and at the samādhi (tomb) of a person was not valid under the Hindu law".⁴

The principles as laid down in Saraswati Ammal's case⁵ on the subject in question have been again applied by the Supreme Court in Nagu Reddiar v. Banu Reddiar.⁶ In that case, the issue to be determined was directly related to whether the dedicating of properties for conducting worship at a samādhi was for religious purposes. The Court has made a distinction between a provision for the purpose of worshipping at a samadhi of an ordinary person and the arrangements for conducting worship in the tombs over the remains of saints and it has been held that

"the rule that a provision for the purpose of puja over the tomb of the remains of a person is invalid, is subject to

1. Per Jagannadhadas, J., AIR 1953 SC 491, 495. See above, p. 100.

2. (1969) 1 SCWR 669.

3. AIR 1953 SC 491.

4. Per Bachwat, J. (1969) ISCWR 669, 670. 5. AIR 1953 SC 491.

6. AIR 1978 SC 1174.

certain exceptions ... there have been instances of Hindu saints having been deified, and worshipped but very few at all have been entombed. Such cases stand on a different footing from the case of an ordinary private individual who is entombed and worshipped thereat."¹

In so far as the question of a bequest for dharma is concerned the leading case is unquestionably Saraswati Ammal's case but let us see whether the case has been adjudged by the Supreme Court correctly. It is regretted that the Court did not accept the authorities'² holding that bequests or gifts for maintaining tombs are valid in Hindu law. P.R. Ganapathi Iyer's observation³ that "Gifts for the maintenance of tombs or samadhis of private persons have been regarded as valid under the Hindu law",⁴ and the ruling of the Madras High Court, in Most Reverend Joseph Colgan v. Administrator-General of Madras⁵ in which the dispute centred round a bequest made by an Armenian, that "where dedication of property in perpetuity for the performance of religious ceremonies, maintenance of tombs and other purposes ... has always been lawful amongst Hindus and Muhammadans",⁶ could not convince the Court to accept the view⁷ that raising a samādhi was a religious purpose recognised by the Hindus.^{7a} Instead the Court observed that "we are unable to find any support from our knowledge and experience";⁸ it is questionable, perhaps, however, how relevant experiential judicial knowledge is in a case of this kind. At this juncture, one really wonders whether the Court was actually ignorant or was reluctant to accept a view not supported by its decision. In my opinion, it was the second alternative by which the Court was influenced

1. Per Kailasam, J., AIR 1978 SC 1174, 1179-1180.

2. AIR 1953 SC 491, 495.

3. Ibid., p.495 as mentioned there.

4. P.223 of P.R. Ganapathi Iyer's Hindu and Mahomedam Endowments, 2nd ed. as mentioned in the case, AIR 1953 SC 491, 495.

5. ILR (1892) 15 Mad 424.

6. Ibid., p. 446.

7. AIR 1953 SC 491, 495. 7a

8. Ibid.

7a. The scriptures and the beliefs of Murti Pujali Swetambar Jains determine whether a bequest for Swamivatsal feasts at Pajusan are religious, charitable or merely meritorious. See Shah Chhotalal Lallubhai v. Charity Comm., Bombay (1965) 67 BomLR 432.

to reach its decision. Otherwise it could not but be convinced by the convincing ruling enunciated in H.R.E. Board v. Narasimham,¹ that the test of whether a particular act is religious

"is not whether it conforms to any particular Agama Śāstras. We think that the question must be decided with reference to the view of the class of people who take part in the worship. If they believe in its religious efficacy, in the sense that by such worship they are making themselves the object of the bounty of some superhuman power, it must be regarded as religious worship."²

In whatever way the Court might try to brush aside the ruling of the Narasimham's case³ e.g. by saying that the case was a "curious"⁴ one, it could not escape from the force of the observation as expressed in the last sentence of the learned scholar, Varadachariar, J. The learned Judge has spoken impressively as to what should be the test to see whether or not a particular purpose is religious.

In this context, it may be pointed out that among the Bengali Hindus (I admit that I have no knowledge about the customs of Hindus of other areas of the sub-continent) it is common practice to raise or to think of raising samādhis⁵ over the remains of ancestors.⁶ Bengali Hindus in general think that it is a pious obligation to construct a samādhi otherwise called a math. It seems that only the economic factor prevents poorer Hindus from constructing maths or samādhis over the remains of their dear ones so that they could satisfy their spiritual instinct. They believe that there is something religious in doing that, as I personally verify.

The fact that so many cases involving the question whether the raising of a samādhi or performing worship thereat is a religious purpose have come to the Supreme Court, and the different High Courts testify to the fact

1. AIR 1939 Mad 134.

2. Per Varadachariar, J.J., ibid., p.135. Emphasis mine.

3. AIR 1939 Mad 134.

4. AIR 1953 SC 491, 495.

5. In Bengali they are called maths (মঠ) as distinguished from maths as we understand as one kind of Hindu religious institutions.

6. I have seen at least three samādhis (maths) of ordinary persons at Kishorganj, Bangladesh where I was born and lived up to the age of nineteen, within a quarter mile of my residence there. One of the samādhis was built over the remains of the father (the late Mahesh Gupta) of Bhupesh Gupta, formerly an M.P. of the Indian Parliament, wellknown all over India.

that people in general believe that it is a religious practice to raise a samādhi or to worship thereat.

"The definition of religion itself, and the determination of the content of a particular religion, as well as the decision as to what practices are or are not enjoined by religion (and so protected by the Constitution) must all be left to the community itself, and the Court¹ cannot substitute its own judgement or skill for the beliefs and theological techniques of the community in question."²

To find the correct test to apply to determine what purposes are religious the Supreme Court does not have to look far; it can look to its own admirable judgement delivered by B.K. Mukherjea, J., as he then was, in Ratilal v. State of Bombay³ where the Court happily approved the commendable ruling of Davar, J. in Jamshedji V. Tarachand v. Soonabai⁴ that a secular judge was bound to accept the belief of the community and held that "No outside authority has any right to say that they are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like...."⁵ and in the same breath it can be said that it is not open to any secular judge to determine purposes as religious in whatever way he likes. As raising a samādhi is believed by some Hindus to be of religious merit, bequests for raising samādhi or making worship thereat must in the appropriate case be held valid.

f. Classes of Religious and Charitable Trusts or Endowments

Endowments, either religious or charitable, are practically gifts or bequests for religious or charitable purposes.⁶ Endowments, in relation to dedications involved in them, may be classified under different headings. The most important ones are (a) religious and charitable, (b) private and public, (c) real and nominal and (d) absolute and partial. As the questions

1. Emphasis supplied.

2. J.D.M. Derrett, "The Definition of Religion in Indian Law" (1959) 61 Bom LR Jnl. 17-23, 23.

3. AIR 1954 SC 388.

4. ILR (1909) Bom 122.

5. AIR 1954 SC 388, 392.

6. S.V. Gupte, op.cit., 2nd ed., 826.

relating to the heads, i.e. private and public, real and nominal and absolute and partial endowments, will be dealt with in detail in the next chapter, a bare outline of the subjects concerned may be given below.

Religious and Charitable Endowments

An endowment or a trust is called religious when it is the outcome of benevolence¹ and it is intended by the founder to acquire religious merit.² "The acquisition of religious merit ... is an important criterion ..."³ A religious endowment stands for an object or a purpose which is essentially spiritual in nature. But in the case of a charitable trust or an endowment, which is the outcome of piety, the object can be to establish a university or to support a hospital or to benefit fellow creatures including animals⁴ or even to run a hostel for Hindu women.⁵

A religious endowment may be made in favour of an idol or the deity or a religious institution, viz. a math. In this context one important point should be remembered, viz. that the property in a religious endowment when dedicated in favour of an idol or the deity, called devata, is called 'debutter'. An idol representing a deity is a symbol of certain religious aspirations. It is called by the deity's name and for all practical purposes it is the deity itself. The dedicated property, which means debottaram, is in Anglo-Indian jargon debutter.⁶ Debutter in its literal sense means belonging to the deity.⁷ Again, it should be remembered that

1. N.R. Raghavachariar, Hindu Law, vol. 1, 7th ed., M.L.J., Madras, 1980, 632.

2. Mayne's Hindu Law, op.cit., 11th ed., 911.

3. Saraswati Ammal v. Rajagopal Ammal, AIR 1953 SC 491.

4. Raghavachariar, op.cit., vol. 1, 7th ed., 632.

5. V. Sridhar v. State of Tamil Nadu (1978) 1 MLJ 437.

6. Derrett, IMHL, 494; P.R. Ganapati Iyer, The Law Relating to Hindu and Mehomedan Endowments, Printed at the Scottish Press by Graves, Cookson & Co., Madras, 1905, XCIX.

7. Raghavarchariar, op.cit., 7th ed., 646.

there is a distinction between a debutter property and a property belonging to a religious institution, called math. In a debutter property the deity occupies the central position but in the case of a math, it is the mahant or a religious teacher who is the presiding element.¹

Public and Private Endowments

In Hindu law, a religious endowment may be either public or private and unlike English law, there is no distinction between a public and a private religious endowment.² There is no hard and fast rule which will decide the question whether a particular endowment is public or private. Thus in Sarjoo v. Ayodhya Prasad,³ where the main point for determination was whether the temple in question was public or private, Shukla, J., delivering judgement for the Allahabad High Court, held that

"it is impossible to characterise any single circumstance as conclusion of the fact as to whether the temple is private or public. The question must be answered on the totality of circumstances."⁴

In each case it is a question of fact.⁵ In Deoki Nandan v. Murlidhar,⁶ the main issue to be decided by the Supreme Court was whether the deity in question was open to public worship. Venkatarama Ayyar, J. spoke for the Court that

"The distinction between a private and a public trust is that whereas in the former, the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former, the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment."⁷

1. Ram Kishore v. Anantaram, 36 (1970) 1 CLT 229, 244.

2. S.Roy, Customs and Customary Law in British India, Hare Press, Calcutta, 1911, 221.

3. AIR 1979 All. 74.

4. Ibid., pp. 76-77.

5. S.V. Gupte, Hindu Law, op.cit., 2nd ed., 840.

6. AIR 1957 SC 133.

7. Ibid., p. 136.

In the case of a private religious endowment the bounty is intended to serve the kith and kin of the donor but in a public endowment the benefit of the trust is conferred on the members of the public.¹

Absolute and Partial Debutter

A dedication of a religious endowment may be either absolute or partial. In the case of an absolute dedication, the deity, as a juristic person, is the owner of the property, i.e. the dedicator gives his property out and out to the deity.² But in the case of a partial dedication, the property is still a secular property³ subject only to a charge⁴ for expenses of performing religious ceremonies, worship of the deity, etc.

Real and Nominal Endowments

In a real endowment, the dedicator divests himself of the property to the extent of interests transferred.⁵ In a dedication where the paramount intention of the settlor is not so much to acquire religious merit as to benefit his chosen few, then it is a case of illusory or nominal endowment which will not be entertained by any Court.

"A gift to a deity must be a substantial gift however small in value, and the Court will not protect a purporting gift in charity which is really a covert provision for the founder's nominees."⁶

In a nominal or illusory endowment the settlor's prime intention is to create a perpetuity in favour of his relatives or nominees.⁷

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1. M. Kesava Gounder v. D.C. Rajan AIR 1976 Mad 102, 111-112.
 2. Iswari Bhubaneswari v. Brojo Nath AIR 1937 PC 185.
 3. S.S. Pillai v. K.S. Pillai AIR 1972 SC 2069.
 4. Benigopal v. S. Gangadhar, AIR 1949 Ajmer 23; Phani Busan v. Kenaram Bhuniya AIR 1980 Cal 255. Mayne's Hindu Law, op.cit., 11th ed., 923.
 5. N.R. Raghavachariar, op.cit., 6th ed., 647.
 6. Derrett, IMHL, 495.
 7. Ganeshji Maharaj v. Krishna Dutt, ILR (1960) 1 All.678.

SECTION 3. THE RULE AGAINST PERPETUITIES

The rule against perpetuities is a Chancery idea "designed to restrict the extent to which future vesting could be postponed".¹ In the history of English law the word "perpetuity" has been used at least in three senses

"as meaning (a) an unbarrable entail, (b) an inalienable interest, and (c) an interest which vests at too remote a date ... the third is the most recent and ... only proper one today".²

Perpetuity as meaning

"unlimited duration: exemption from intermission or ceasing ... is odious in law, destructive to the common-wealth and an impediment to commerce, by preventing the wholesome circulation of wealth".³

In other words, when it appears clearly from a direction in a disposition of property as regards the corpus that it is meant to be kept for ever and the income of the property is to be enjoyed generation after generation, "the direction amounts to a perpetuity".⁴ In this context it must be pointed out that in so far as the rule against perpetuities is concerned, it regulates the vesting of interests only and in no way their duration.⁵

Now, old texts of Hindu law are silent on the question of perpetuities.

We:

"may be surprised to find that there is nothing in the texts of that system which has any direct bearing on the question of perpetuities. Twist our texts as we may, we search in vain for any in which the matter may be supposed to be even remotely dealt with."⁶

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1. Hanbury and Maudsley, Modern Equity, op.cit., 10th ed., 333.
 2. J.H.L. Morris and W.B. Leach, The Rule Against Perpetuities, 2nd ed., Stevens & Sons, London, 1962, 7.
 3. Jowitt's Dictionary of English Law, vol. 2, 2nd ed., Sweet & Maxwell, London, 1977, 1352.
 4. S.V. Gupte, op.cit., 2nd ed., 778.
 5. Keeton and Sheridan, The Modern Law of Charities, op.cit., 2nd ed., 202.
 6. Asutosh Mukhopadhyay (the future Sir Asutosh Mookerjee), The Law of Perpetuities in British India, Thacker, Spink & Co., Calcutta, 1902, 58-59.

An early judgement of the Privy Council in effect and some decisions of the Calcutta High Court were against applying the English doctrine of perpetuities to Hindu bequests. In Sonatun Bysack v. Sreemutty Juggutsoondree Dossee¹ where the only question to be determined was the "question of the construction to be put upon a Hindoo will", Turner, L.J. delivering the judgement for the Privy Council held

"with reference to the testamentary power of disposition by Hindoos, that the extent of this power must be regulated by the Hindoo law."²

Giving a wider meaning to the Privy Council's ruling, Peacock, C.J. in Kumara Asima v. Kumara Kumara,³ a case also involving the question of the construction of a will, observed that

"I am not aware of any rule of the Hindu law, by which grants inter vivos, or gift by will, in perpetuity, are expressly prohibited; but it appears to me to be quite contrary to the whole scope and intention of Hindu law, and that there are no means according to the Hindu law by which such gifts or grants can be effected."⁴

In this context it may be pointed out, with due respect, that the statement of B.K. Mukherjea that

"In Juggatsundary v. Manickchand it was held by the Judicial Committee that the extent of the testamentary powers of the Hindus must be regulated by the Hindu law and the peculiar doctrine of the English law against perpetuity, a doctrine of a technical character not found on any principle of general jurisprudence, was inapplicable"⁵

involves serious discrepancies. First of all, the case decided by the Judicial Committee was not Juggutsoondree v. Manickchand. Manickchand was not a party to the suit when the case was decided by the Privy Council. Manickchand, as a defendant, was a party to the suit when the case was

1. (1859-61) 8 MIA 66.

2. Ibid., p. 85.

3. (1869) 2BLR OJ-C 11, 34.

4. Ibid., p.36. The same learned Judge earlier had ruled in Goberdhone Bysak v. Sham Chand, Bourke 282 to the effect that "English law against perpetuities could not be engrafted upon a Hindu will" (1869) 2BLR OJ-C 11, 32.

5. Mukherjea, op.cit., 4th ed., 135.

in the Supreme Court but he died intestate. The present appeal to the Privy Council was "brought from the decretal Order of the Supreme Court on the 4th of August, 1857"¹ after the death of Manickchand Bysack. Secondly, the case was decided by the Judicial Committee in 1859, not in 1857 as cited by B.K. Mukherjea. Thirdly, though the question of perpetuity was raised by the appellant's counsel in that case, the Judicial Committee never ruled as such that the rule against perpetuities was not applicable to Hindu law. The ruling of the Privy Council that the Hindu testamentary disposition should be governed by Hindu law, had been given wider meaning by Sir Barnes Peacock, C.J. in Kumara v. Kumara² when Sir Barnes observed that

"The Judicial Committee appears to us to have determined the question of perpetuity; that question was raised in the suit by Jagatsundari. Sir J. Colville,³ in his judgement in that case gave effect to the rule against perpetuities. The Privy Council did not expressly refer to the question, ..."⁴

Finally, the aforesaid statement of Mukherjea,

"...and the peculiar doctrine of the English law against perpetuity, a doctrine of a technical character not founded on any principle of general jurisprudence, was inapplicable"⁵

meaning as a rule of the Judicial Committee, cannot be traced in the judgement of the case. He might have taken, inadvertently, the argument of the appellant's counsel that "the peculiar doctrines of the English law against perpetuities; doctrines of a technical character, and not founded on any principle of general jurisprudence"⁶ with some modification in wording, as a part of the decision of the case.

But eventually the rule against perpetuities was introduced in India in

1. (1859) 8 MIA 66, 81.

2. (1869) 2 BLR OJC 11.

3. The judgement of the case was delivered by Turner, L.J., not by Sir J. Colville as stated there.

4. (1869) 2 BLR OJ-C.11, 34. Emphasis mine.

5. Mukherjea, op.cit., 4th ed., 135.

6. (1859) 8 MIA 66, 82.

statutory form in Sec. 101 of the Indian Succession Act, 1865, corresponding to Sec. 114 of the present Succession Act, 1925, which reads:

"No bequest is valid whereby the vesting of the bequeathed may be delayed beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

The provision of this section was later on extended to [^]Hidus by Sec. 2(a) of the Hindu Wills Act, 1870 providing that Sec. 101 of the Indian Succession Act, 1865 would apply to "all wills and codicils made by any Hindu, Jaina, Sikh or Buddhist on or after the first day of September, 1870." The rule was also subsequently embodied in Sec. 14 of the Transfer of Property Act, 1882. The decision of the Judicial Committee in Sookmoy Chaunder Dass v. Srimati Monohurr Dasi¹ confirmed the application of the doctrine against perpetuities in Hindu law, when declaring the will in question invalid, it held that the object of the testator appeared "to have been to create a perpetuity as regards the estate, and to limit, for an indefinite period, the enjoyment of the profits of it which would not be allowed by Hindu law."²

But the rule against perpetuities is not applicable to a religious endowment³ in favour of a temple or to a bequest for the purpose of worship of an idol or for any other religious or charitable purposes.⁴ In Prafulla Chunder v. Jogendra Nath⁵ in which the suit was for different reliefs including the construction of a will, Sale, J. held that in

"order to constitute a valid endowment all that is necessary is to set apart specific property for specific purposes and where these purposes are, as in the will, clearly religious and charitable in their nature, the trust is not invalid merely because it transgresses against the rule which forbids

1. (1895) 12 IA 103.

2. Per Sir Richard Couch, ibid., p.108.

3. Mulla's Principles of Hindu Law, 14th ed. Reprint, N.M. Tripathi, Bombay, 1978, 484; Sir Ernest John Trevelyan, Hindu Law, 3rd ed., Thacker, Spink & Co., Calcutta/Simla, 1929, 583.

4. Asutosh Mukhopadhyay, op.cit., 136.

5. (1904-5) 9 CWN 528.

creation of perpetuity (Mayne's Hindu Law, 4th ed., Para 395)."¹

The doctrine as laid down in Tagore v. Tagore² that a gift to an unborn person is not valid has never been applicable in cases of gifts or trusts as made for religious purposes.³ In Bhupati Nath v. Ram Lal⁴ where the main question was

"Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void?"⁵

Sir Asutosh Mookerjee answered that

"the doctrine laid down by the Judicial Committee in the cases of Tagore v. Tagore⁶ and Bai Motivahu v. Bai Mamubai⁷ as to gifts in favour of sentient beings, has no application to directions for the dedication of property for the establishment of images and for the worship thereof."⁸

An endowment for a religious or charitable purpose starts life mostly as a gift or a bequest for such purposes. Almost all rules governing gifts inter vivos and gifts by will govern endowments for religious or charitable purposes as well, except that a religious or charitable endowment, because of its special characteristics, is regulated on a different footing.⁹

In this connection, it may be pointed out that recent decisions of both the Supreme Court and some High Courts relating to cases of Hindu religious endowments, where the question of the interpretation of a will or a trust is generally involved, unmistakably point to the fact that the Courts are

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1. Ibid., p. 535. The same learned Judge had earlier ruled in Bhuggobutty Prosonno v. Gooroo Prosonno, ILR (1898) 25 Cal 112, 125, a case relating to the construction for will that no dedication would be invalid merely because of the reason that it transgressed against the rule against perpetuities.
 2. (1872) 9 B LR. 377 = (1872) IA. Sup. Vol. 47.
 3. Mayne's Hindu Law and Usage, op.cit., 11th ed., 888.
 4. ILR (1910) 37 Cal 128 (FB).
 5. Ibid., p. 134.
 6. (1872) IA Sup. Vol. 47.
 7. ILR (1897) 21 Bom 709.
 8. ILR (1910) 37 Cal 128 (FB), 156.
 9. S.V. Gupte, op.cit., 2nd ed., 826.

reluctant to allow the disputed properties to be tied up as absolute debutter, free from the rule against perpetuities. Whereas for long it was assumed that the Court's prime task was to effectuate a testator's or settlor's intention and to protect Indian religious institutions, Independent India is coming to realise that even the strongest fiscal devices are not preventing the accumulation of capital in unproductive forms, hostile to the nation's development. In other words, it seems that keeping social needs in view, the Courts tend not to construe wherever possible instruments nominally, as opposed to actually, dedicating property for religious purposes as creating an absolute debutter so that they could transgress the rule against perpetuities. The Courts are leaning against absolute rather than partial debutter, thus enlarging the availability of capital for intestate succession and so enlarging amounts of property assessable to the full range of fiscal devices including Estate Duty and Gift Tax.

In Jadu Gopal v. Pannalal¹ where the issue was the interpretation of a trust, the Supreme Court without accepting the meanings involved in some clauses of the trust, to suit its own judgement, chose two clauses² to support its decision that the suit property was not absolute debutter. If the Court had wanted to reach the opposite conclusion, it could have found valid grounds in many other clauses³ where it could be seen to be spelt out that the donor intended his dedication as an absolute one, i.e. he divested himself of the interests in the dedicated property.

1. AIR 1978 SC 1329. See below, sec. 3(b) of the third Chapter.

2. "Clauses 4 and 15 ... read together, seem to indicate that the settlor had not completely and permanently divested himself of the property covered by this deed." - 338.

3. In clauses 1, 4, 6, 13 and 16 the settlor clearly speaks out his mind that he intended the dedicated property to be absolute debutter. Moreover, in clause 16 he spoke of a possible appointment of Government administrator of the trust property in case all the trustees and shebait became extinct and it was the clear indication that he did want his property to be absolute debutter property.

In Phani Bhusan v. Kenaram Bhunia,¹ the Calcutta High Court did not accept the findings of the lower Courts that the suit property was absolute debutter property. Moreover though the Court accepted two documents pointing to the fact that the property in question was absolute debutter and it also added in its judgement that "The plaintiff could not adduce any clear and cogent evidence to rebut the presumption arising out of the entry in the C.S. Khaitian regarding the debutter character of property,"² even then the Court ruled that the property was a partial debutter property, i.e. it was alienable but subject to a charge of expenses for performing religious functions.

Reverting specifically to the rule against perpetuities, in M. Kesava Gounder v. D.C. Rajan³ the Madras High Court had to interpret some documents and the Court readily accepted the plea of the appellant's counsel to re-examine⁴ a particular document called "Ex. A-1" to find out whether the bequests involved providing inter alia for the erection of the statue of the father by the son, would offend against the rule against perpetuity. It did not accept the argument of the respondent's counsel that the grant in the document (Ex. A-1) was a private trust for religious purposes; it rather held that the grant was an attempt to give a colourful garb settling the property in perpetuity on the nominees of the donors. Rao, J. observed for the Court that

"restraints in alienations and the rule against remoteness being the two principles well knit as between each other ought not to be encountered by courts of law, which administer not only law but also equity and good conscience. It is in this background that the recitals in Ex.A-1 have to be adjudged to find whether they offend the rule against perpetuity.

"On a prima facie reading of Ex.A-1, it is clear that the first defendant has tied up the circulation of the properties and has created devices whereby certain benefits are conferred only upon certain named individuals and their heirs and thus

1. AIR 1980 Cal 255 cited below, see sec. 3(b) of the 3rd Chapter.

2. Ibid., p. 257.

3. AIR 1976 Mad 102.

4. Ibid., p. 109.

the course by normal inheritance is tampered with. Though of course Ex-A1 begins with a dedication for the purpose of erecting a statue for the first defendant's living father ... yet the other bequests therein ... make it clear that the dedication is not the real one ..."¹

Once designated as a "peculiar doctrine of the English law against perpetuity"² the principle has been accepted by the modern Indian judiciary as a 'well-known rule'. The social undesirability of religious foundations, particularly family foundations of a perpetual character, has evidently made itself felt in these quarters irrespective of considerable lip-service to traditional religious beliefs and practices.

It is true that when the community at large is deemed to have benefited religiously by an endowment we might not repine. But a question mark hovers over the well recognised Hindu disposition called 'private religious endowment (debutter)' which is a dedication nominally in favour of a private idol, because here both the religious and the material benefits go not to the members of the public but to some ascertainable individuals of a family. Moreover, because of the inapplicability of the rule against perpetuities in religious endowments and the fact that there is very restricted alienability³ of debutter properties, the income from them goes generation after generation virtually to a particular family, thereby affording an accumulation, thus serving practical, no less than 'pious', purposes. In my opinion, in the case of a private endowment where there is a vast sum of accumulated wealth, leaving a sufficient amount to cover the expenses relating to the purposes of the endowment the State should, giving some compensation, confiscate the rest of the wealth for the good of the poor.

1. AIR 1976 Mad 102, 109.

2. Mukherjea, op.cit., 4th ed., 135.

3. As a general rule debutter property is inalienable but a shebait or a mahant can alienate it on grounds of necessity or the benefit to the estate - Prosunno Kumari Debya v. Golab Chand Baboo (1874-75) 2 IA 145, 151. See below, sec. 1, 5th Chapter, where this important case is dealt with in detail.

SECTION 4. THE CY PRÈS DOCTRINE - ITS APPLICATION IN HINDU LAW

a. English law on the subject.

The phrase "cy près" means 'near to it'.¹ The cy près doctrine as evolved by the Chancery Courts, is a doctrine of construction² and one main principle of this doctrine is that

"where there is a gift on trust for a charity which can be substantially, but not literally, fulfilled, it will be effectuated by moulding it so that as nearly as practicable the intention of the benefactor may be carried out."³

This legal concept, cy près, as established by judicial decisions, is to satisfy the question as to whether or not a particular trust should fail or the trust property should be utilised for other charitable purposes when it is found that the charitable purposes for which a certain property is given "cannot be carried out in the precise manner intended by the donor."⁴

An important pronouncement on the origin of the doctrine of cy près was made by Lord Eldon in Moggridge v. Thackwell⁵ the subject matter of which was concerned with the construction of a certain will. His Lordship observed that

"In what the doctrine originated, whether, as supposed by Lord Thurlow in White v. White (1 Bro. c.c. 12),⁶ in the principles of the Civil Law, as applied by charities, or in the religious notions entertained formerly in this country, I know not: but we all know, there was a period, when in this country a portion of the residue of every man's estate was applied to charity; and the Ordinary thought himself obliged so to apply it; upon the ground that there was a general principle of piety in the testator. ... I have no

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1. Jowitt's Dictionary of English Law, vol. 1, 2nd ed., Sweet & Maxwell, London, 1977, 540.
 2. Wharton's Law Lexicon, 14th ed., 3rd impression, Stevens & Sons/Sweet and Maxwell, London, 1949, 294.
 3. Stroud's Judicial Dictionary, vol. 1, 4th ed., Sweet & Maxwell, 1971, 670.
 4. Hanbury and Maudsley, Modern Equity, op.cit., 10th ed., 421.
 5. (1803), 7 ves 36.
 6. (1878) 1 Bro c.c. 12.

doubt, that cases much older than those I shall cite may be found; all of which appear to prove, that if the testator has manifested a general intention to give to charity the failure of the particular mode in which the charity is to be effectuated, shall not destroy the charity; but, if the substantial intention is charity, the law will substitute another mode of developing the property to charitable purposes, though the formal intention as to the mode cannot be accomplished."¹

It is on the basis of this principle, as expounded in the last sentence of Lord Eldon's observation, that the cy près doctrine is applied in trusts.

Again, originally the jurisdiction of applying charitable gifts cy près belonged to the ecclesiastical Courts, but later on, specifically after 1600, the Court of Chancery took over the jurisdiction; it also assumed the rules, developed by Church Courts, including the doctrine of cy près.

Two

"factors contributed to the liberal construction of gifts to charity. First, there was the wholesale reception of the civil law rules of construction into the church courts, of which the doctrine of cy près was one. Secondly, the theoretical implications of legacies of religious charities, which were deemed to confer spiritual benefits on the testator, had the natural result of the emphasis being placed on the object rather than the mode."²

The cy près doctrine "is essentially a device for keeping in existence a gift to charity so that it may continue as a public benefit from generation to generation."³

If a private trust fails the beneficial interest comes back or results to the settlor⁴ i.e. there is an implied or a resulting⁵ trust for the

1. (1803), 7 Ves 36, 169 - emphasis is mine.

2. L.A. Sheridan and V.T.H. Delany, The Cy-près Doctrine, Sweet & Maxwell, London, 1959, 9.

3. Report of the Committee on the Law and Practice relating to Charitable Trusts (Nathan Committee Report), Cmd 8710, H.M.S.O., London, 1952, para. 71, 17.

4. Pettit, op.cit., 4th ed., 221.

5. The difference between an implied trust and a resulting trust is one of terminology. Snell's Principles of Equity, op.cit., 27th ed., 172. An implied 'or resulting' trust arises "whenever upon a conveyance, devise or bequest it appears that the grantee, devisee or legatee was

settlor.¹

"A common case of an implied or resulting trust arises where a settlor conveys property upon trusts which in the event do not exhaust the whole of the beneficial interest in the property, as where the trust is for A for life and then equally among his children, and A dies a bachelor. Here the beneficial interest, so far as it is not effectively disposed of, results to the settlor, or, if he is dead, to his residuary devisee or legatee, or the persons entitled under his intestacy. What a man does not effectually dispose of remains vested in him."²

The position in the case of a charitable trust may be the same as that of a private trust, but in practice the property of a charitable trust is commonly saved by the application of the cy-près doctrine.³

"Where property is given for charitable purposes and the purposes cannot be carried out in the precise manner intended by the donor, the question is whether the trust should fail, or whether the property should be applied for other charitable purposes. The cy-près doctrine, where it applies, enables the court (or now the commissioners) to make a scheme for the application of the property for other charitable purposes as near as possible to those intended by the donor."⁴

As a condition precedent to the cy près application, it must be shown that there was an intention to benefit charity.⁵ Before the introduction of the Charities Act, 1960, the rule was that the doctrine could be applied only when it

"was impossible or impracticable to carry out the declared trust. The rule covered both the case where the declared trust was initially impossible, and the case of supervening impossibility, and also cases where there was a surplus of funds after the particular charitable purpose had been fulfilled."⁶

(continued from previous page)

intended to take the legal estate..., the equitable interest or so much thereof as is left undisposed of, will result, if arising out of the settlor's reality, to himself, or his heir, and if out of his personal estate to himself, or to his personal representatives" - F.W. Maitland, Equity, Cambridge University Press, 1920, 77.

1. Snell's Principles of Equity, op.cit., 27th ed., 160.
2. Ibid., p: 172.
3. Pettit, op.cit., 4th ed., 221.
4. Hanbury and Maudsley, Modern Equity, op.cit., 11th ed., 1981, 504.
5. G.W. Keeton and L.A. Sheridan, The Modern Law of Charities, op.cit., 2nd ed., Belfast, 1971, 136.
6. Pettit, op.cit., 4th ed., 222.

The old rule has been modified by the Act which makes it unnecessary to decide the issue whether there is impossibility in the sense of the old rule.¹

Now, to find a general charitable intention of the donor out of a certain trust deed is a question of construction. If a general charitable intention cannot be made out, the trust will fail. The cardinal rule that the application of the cy près doctrine is permissible only when a paramount intention of charity has been manifested by the donor, can be traced to the classic statement of Parker, J. in Re Wilson² in which a testator bequeathed all his property to his three daughters on condition that if all of them should die without any surviving issue, the whole principal of their fortune together with interest should be utilised for other purposes including appointing a teacher. Parker, J. had ruled that

"I think the authorities must be divided into two classes. First of all we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose,³ and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good....

"Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift being in form a particular gift, - a gift for a particular purpose - and it being impossible to carry out that particular purpose, the whole gift is held to fail.⁴ In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a construction of a particular instrument."⁵

In that case, since it appeared from the construction of the will that no general charitable intent was there, Parker, J. held that the gift in question failed altogether.

1. Snell's Principles of Equity, op.cit., 27th ed., 161.

2. [1913] 1 Ch. 314.

3. Emphasis mine.

4. This principle could have been applied in the facts of Bansi Dhar v. State of Uttar Pradesh, AIR 1974 SC 1084, as discussed in the end of this section.

5. [1913] 1 Ch. 314, 321.

- b. The doctrine of cy près as applied by the Indian Courts specially in Hindu law.

Most of the principles of the cy près doctrine as expounded by the judicial decisions of the English courts have been adopted and applied by the Indian Courts.¹

At the outset, it must be remembered that the performance of directions as given in a bequest that the income or the property should be spent for a charity, will be supervised by a Court only when the indicated purpose is certain and charitable. Unless the purposes can be defined, the Court does not frame a scheme for trusts even if a general intention can be ascertained from the construction of a particular trust. If in a given bequest, the directions are given to the trustees to make a choice among objects which are undoubtedly charitable, the bequest is good.

"If, on the other hand, the testator is specific, the purpose is charitable and he has manifested a general intention to give to charity, but the charity he chooses is not extant at his death, and not capable of being brought into existence under the rule that saves gifts to non-existent idols or has become impractical thereafter, the Court will apply the property cy près to a charitable purpose nearest to the testator's intention."³

On the question of application of the doctrine where there arises a surplus of funds after the fulfilment of a particular charitable purpose, the leading authority is the Privy Council case of Mayor of Lyons v. Advocate General of Bengal.⁴ In that case, there was a surplus on the original bequest and the Judicial Committee applied it cy près and declined

1. B.K. Mukherjea, op.cit., 4th ed.

2. The rule that to attract the application of the doctrine of cy près, the first condition to be satisfied is that the donor has clearly evidenced a general intention to give to charity, has been explained in Vadivelu v. N.S. Rajabada AIR 1967 Mad 175. In that case, the main point for determination was whether the cy près doctrine could be applied, to increase the allowance of the descendants of the donor, in the surplus of the charity fund. It was ruled there that "where a fund to charity is not exhausted by the particular purpose specified by the donor, the surplus will be applied cy pres if the donor had a general charitable intention." - Per Ramachandra Iyer, C.J. at 179. The decision of the High Court was upheld by the Supreme Court in Rajabathar v. Vadivelu (1970) 2 SCR 299.

3. Derrett, IMHL, 488-489.

4. (1876) 3 IA 32.

to accede to the claim of other charities who are entitled to the surplus. The Judicial Committee ruled that a general principle could not be laid that the doctrine of cy près was invariably displaced when there was a surplus on an original bequest.

In Ramaswami v. Aiyasami,¹ the main points for determination were whether the trust in question was a valid one and whether a scheme could be framed for its further management. Moreover, in that case, the intention of the testator was not clearly specified. The Madras High Court ruled that a scheme to achieve the purpose of feeding the poor could be arranged to effect the management of the trust property. In other words, it was ruled that the trust property could be applied cy près. But the Court will not substitute any alternative method where the purpose is clear and practicable. In Advocate-General v. Fardoonji,² a testator made a bequest of seven thousand and five hundred rupees for the purpose of distributing brass pots among the members of his caste and the Saraswat Brahmins in Bombay. He made provisions in another bequest for distribution of copper pots and sugar candy to the members of his caste and the Saraswat Brahmins in many villages in Cutch. The Advocate-General, at the relation of the plaintiffs, filed the suit, contending that it was impracticable to carry out the bequests and he also submitted that in the event of their being declared invalid, the Courts should apply them cy près to some other most useful charitable object under a scheme framed by it. Holding the bequest as valid, Davar J. ruled that

"In cases of charitable bequests, the Court has no right to set aside the wishes of the testator and substitute another charity in the place of one directed to be established by him, simply because the one might not be so useful as some other the Court might substitute. This question is settled so definitely and the principles are laid down with such clearness, that I think it is unnecessary to enter into a further legal discussion on the subject."³

1. AIR 1960 Mad. 467.

2. (1911) 13 Bom LR 332.

3. Ibid., p.341.

The point of view adopted is characteristic of the last century and the first half of this present century when the rights of the proprietor were regarded as of paramount importance. However, on referring to the new insertion¹ of sub-section (3) to section 92 of the Code of Civil Procedure, 1908 (Act 5 of 1908) by the Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976), it would seem that a Court may alter the original aims of a trust and allow the trust property to be applied cy près to allied and common purposes.

Generally, the cy près doctrine cannot be applied if the charitable gift is contingent on the fulfilment of certain conditions. In other words, to attract the application of the doctrine of cy près, the gift must be an absolute, not a conditional one. In Sreemutty Santana Roy v. Advocate-General of Bengal,² the settlor intended his debts to be discharged out of the income of his zemindari properties and, out of the balance, an amount of five hundred rupees should be spent every month by the trustees for medical and educational charities within the zemindary. Subsequent events made the fulfilment of every condition impossible. Sir Asutosh Mookerjee, J., observed,

"In the circumstances, the case, in our opinion, falls within the principle that where a charitable gift is made upon a condition precedent, the gift fails if the condition is not satisfied, a principle of fundamental importance which has been repeatedly recognised by the Courts."³

It was further pointed out by the learned Judge that the cy près doctrine was applied only in wills and not in deeds. Thus he observed that "There is ... weighty authority for the proposition that the doctrine of cy près is applied only in wills⁴ and not in deeds."⁵ But a different view,

1. See below Appendix IIB.

2. (1920-21) 25 CWN 343.

3. Ibid., pp. 343, 353.

4. The view was approved and the principle was applied in Ravana v. Vana AIR 1962 Mad. 500.

5. (1920-21) 25 CWN 343, 355.

viz. that the doctrine can be applied to deeds or gifts inter vivos as well, especially in charitable cases, was favoured by the Andhra Pradesh High Court in Venkata Rama v. Venkatappayya¹ in which the main point for decision was whether a particular village was dedicated for tope² for the public benefit and in Potti Swami & Bros. v. Govindarajulu³ which related to the question of recovery of subscriptions paid to a certain hospital association. The view of the Andhra Pradesh High Court has been accepted by the Supreme Court in State of Uttar Pradesh v. Bansidhar⁴ where the Court has discussed the doctrine of cy près and pointed out its different modes of application. K. Iyer, J. observed for the Supreme Court that

"we are inclined to the view that, both testamentary and non-testamentary gifts for public charitable purposes must be saved by a wider intervention of the Court, for public interest is served that way. Neither principle nor precedent bars this broader invocation of the court's beneficent jurisdiction."⁵

In so far as the question of the applicability of the doctrine of cy près in an Hindu religious endowment is concerned, the Supreme Court case, State of Uttar Pradesh v. Bansi Dhar⁶ seems to be the most important one. In Ratilal v. State of Bombay,⁷ though the Supreme Court dealt with the matter of the application of the cy près doctrine to a charitable trust, its prime concern was to determine the issues relating to the provisions of Arts. 25 and 26 of the Constitution (which deal with freedom of religion). But in Bansi Dhar's case,⁸ the judgement of the Court was directly related to

1. AIR 1960 AP 35.

2. This word signifies inter alia, mango or other such grove. The Concise Oxford Dictionary, H.W. and F.G. Fowler (ed.), 5th edition, Oxford University Press, London, reprinted, 1973, 1368. In the case at issue, the tope in question was dry land with tamarind trees meant inter alia, for a resting place for the members of the village - AIR 1960 AP 35, 36.

3. AIR 1960 AP 605.

4. AIR 1974 SC 1084.

5. Ibid., pp. 1090 - 1091.

6. AIR 1974 SC 1084.

7. AIR 1954 SC 388.

8. AIR 1974 SC 1084.

the question of the application of the doctrine in particular circumstances. In that case, an old man gave thirty thousand rupees on the basis of a matching contribution by the Government for establishing a women's hospital in memory of the donor's wife. But the construction of the hospital was long delayed. After the legal action taken by the sons of the deceased old man for the recovery of the sum donated for a six-bedded women's hospital, the Government, in the meantime, constituted a new committee and built a hospital with twenty-two beds in the same proposed location. But the new hospital was a total departure from the original project which induced the donor to make the conditional gift of thirty thousand rupees. The main point for determination by the Court was as preliminary to the application of the cy près doctrine, the nature of the charitable object - whether it was general or specific. To attract the application of the doctrine, K. Iyer, J., speaking for the Supreme Court, held that

"there must be a larger intention to give the property, in the first instance, secondly, there must be impossibility, not in the strict physical sense but in the liberal diluted sense, of impracticability. Even here it must be mentioned, however, that the cy près application of the gift funds assumes a completed gift. It is essential that a gift has been made effectively before its actual implementation by application of the funds literally or as nearly as may be, arises."¹

Holding that the gift in question was a conditional but not an absolute one, the Court ruled also that "where the donor has determined with specificity a special object or mode for the course of benefaction, the Court cannot innovate and undo".² In that case, as the conditions failed, the learned Judge observed that "the charity proved abortive, and the legal consequence is a resulting trust in favour of the donor. The State could not keep the money and the suit was liable to be decreed."³

1. AIR 1974 SC 1084, 1091.

2. Ibid., p.1093. This ruling of the Court seems to be the affirmation of the principle in a different language, as laid down by Davar, J. in Fardoonji's case (1911) 13 Bom LR 332, discussed earlier in the section that the Court has no right to replace the charity, intended and directed to be established by the testator, by another charity.

3. Ibid., pp. 1093-1094.

It is suggested that in the context of India to-day, the Courts should be more discriminating and apply the doctrine of cy près sparingly in religious endowments, otherwise, more lands or other properties will be tied up because of the inapplicability of the rule against perpetuities. Social needs demand the availability of more lands for secular purposes.

CHAPTER III

TRUSTS IN FAVOUR OF IDOLS - DEBUTTERSection 1. IDOLS AS JURISTIC PERSONS AND THEIR LIABILITY ~~TO~~ TAXATIONa. Idols as Juristic Persons

Hinduism accepts the doctrine of Karma according to which good deeds will result in good results in this life or lives to come. Success and prosperity in this life and in the hereafter can be achieved by donations to idols or by being liberal to the poor and other deserving causes. It is believed that the grace of the deity will be available to sincere worshippers and sincerity of worshippers is judged in part by their generosity.¹ In this context it may be pointed out that in the Vedic period there were no images or temples of images and as a result no trace of idol worship could be found.² Thus F. Max Müller observed that "the worship of idols in India is a secondary formation, the later³ degradation of more primitive worship of ideal gods."⁴

But it must be stressed that though no trace of idol worship could be found in the Vedic period, the existence of idols as such could be traced to that period. In an important study⁵ (a critique of the famous Privy Council case of Pramatha Nath v. Pradhyumna Kumar, AIR 1925 PC 139) A.B. Keith quoting from the Rig-Veda pointed out that "we have the highest

1. Derrett, RLSI, 48.

2. J.C. Ghose, The Hindu Law of Impartible Property Including Endowments, S.C. Auddy & Co., Calcutta, 1908, 243-244.

3. But the exact period of introduction of idol worship is not known. See B.K. Mukherjea, op.cit., 4th ed., 24.

4. Chips from a German Workshop, vol. 1, Longmans, Green & C., London, 1867, 38. On this point see also Will Durant's The Story of Civilization (Our Oriental Heritage), pt. 1, Simon and Schuster, New York, 1942, 405.

5. "The Personality of an Idol" (1926) 30 CWN, xlviii-xlix. Cited also by G-D. Sontheimer (at p.48, footnote 8) in his article which is cited below in this section; see also Derrett, RLSI, 486, footnote 2.

authority for the conception of an idol as a piece of merchandise..."¹
 Derrett clarifies the position when he observes that, "Since Rigvedic times we have known of people who kept idols and loaned them to people for magical purposes, and thereby, no doubt, made a substantial income from them."²

In the Vedic times gifts were made to the gods by oblations in the fire which was thought to be the carrier to the gods. "The fire was therefore called Hutabaha, the carrier of sacrifices."³ At a later stage, making a valid gift by way of dedicating property became common.⁴ The logical conclusion is that there was no use in dedication of property for the worship of idols in the Vedic times.⁵

But modern Hinduism is not the same as the Vedic religion⁶ though the former owes its origin and some of its aspects to the latter and the Vedāṅgas. To-day no one can question the view that a Hindu idol is capable of being endowed with property. In so far as the law is concerned there is no distinction between a family idol and a public idol, between an idol made of bronze and an idol made out of stone.⁷ Whether an image made either of stone or of bronze is a representative of the deity is entirely determined by the Śāstra.⁸

In Manohar Ganesh Tambekar v. Lakhmiram Govindram,⁹ West, J. (a painstaking

1. Keith, op.cit., xlix.

2. RLSI, 486.

3. J.C. Ghosh, op.cit., 242.

4. N.C. Sen-Gupta, Evolution of Ancient Indian Law, Arthur Probsthain, London and Eastern Law House, Calcutta, 1953, 246-247.

5. J.C. Ghose, The Hindu Law..., op.cit., 243.

6. Prannath Saraswati, op.cit., 38, where the learned author points out that the evidence of the existence of images as we find them in Hinduism of today can be found in the later Vedic literature.

7. Derrett, IMHL, 493-494.

8. P.V. Kane, History of Dharmasāstra, vol. 2, pt. 2, 2nd ed., B.O.R.I., Poona, 1974, 896-903; Derrett, RLSI, 484.

9. ILR (1887) 12 Bom 247. The decision of the Bombay High Court was upheld by the Privy Council in Chotalal v. Manohar Ganesh Tambekar ILR (1900) 24 Bom 50 (PC).

student of the Hindu law) accepting the contention of the plaintiff's argument that the defendants as sevakas of the deity of the temple of Dakor were "as recipients of the offerings at the idol's shrine, accountable, as trustees, for the right disposal of the property thus acquired",¹ ruled that

"The Hindu law, like the Roman law and those derived from it, recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations..."²

His Lordship referring to the deity in question further commented that

"if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation, the artificial subject of rights is as capable of taking offerings of cash and jewels as of land."³

West, J.'s observation is unquestionably a leading authority to support the view that a Hindu idol is a juristic person capable of being endowed with the property of land, but the same view that a gift can be made to a deity had been expressed long ago in Kumara Asima Krishna v. Kumara Kumara Krishna⁴ where Markby, J. remarked, "it being assumed to be a principle of Hindu law that a gift can be made to an idol which is a caput mortuum."⁵

A Hindu idol having a juridical status can vindicate its rights by suit. It is said that the attribution of juristic personality to a Hindu deity is only a legal fiction, based on Hindu religious ideas.⁶ In Pramatha Nath v. Pradhyumna Kamur⁷ where the questions as raised were related generally to the management and worship of a family idol and where a specific question for decision was the nature of an idol, Lord Shaw observed for the Judicial

1. ILR (1887) 12 Bom 247, 258.

2. Ibid., p. 263.

3. Ibid., p. 265.

4. (1869) 2 BLR O.J-C 11.

5. Ibid., p. 47.

6. S.R. Baj, "Juristic Personality of an Idol in Hindu Legal Philosophy", (1963) Jaipur Law Journal, vol. 3, 229-236, 235.

7. AIR 1925 PC 139 = (1925) 52 IA 245.

Committee that

"A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus and the recognition thereof by courts of law, a juristic entity. It has a juridical status with the power of suing and being sued."¹

Now, when a donor dedicates his property absolutely for the worship of an idol or a deity, the dedicated property vests in the idol itself, as a juristic person.² Approving the view regarding the vesting of the dedicated property as clarified by Mukherjea,³ Grover, J. observed in Kalanka Devi Sansthan v. M.R.T. Nagpur⁴ that, "Now it is well known that when property is given absolutely for the worship of an idol it vests in the idol itself as a juristic person."⁵

Though the view that the dedicated property vests in the idol itself as owner had been affirmed long before by the Privy Council in both Maharanees Shibessouree Debia v. Moothooranath Acharajo,⁶ a case where an issue for determination was whether the tenure connected with the talook as dedicated to the idol in question was hereditary and Prosunno Kumari Debya v. Golab Chand Baboo,⁷ a case dealing with the question relating to the power of a shebait to alienate an idol's estate, in those two cases the Judicial Committee did not formulate the ruling regarding the nature of an idol as clearly as we find it expressed in later cases.

In Vidya Varuthi v. Balusami Ayyar,⁸ Mr. Ameer Ali speaking for the Privy Council held that "under the Hindu law the image of a deity of the Hindu

1. AIR 1925 PC 139, 140.

2. B.K. Mukherjea, op.cit., 4th ed., 157= 2nd ed., Eastern Law House, Calcutta, 1962, 142.

3. Ibid.

4. AIR 1970 SC 439.

5. Ibid., p. 441.

6. (1869-70) 13 MIA 270, 273.

7. (1874-5) 2 IA 145, 150-151. The case is very important for our thesis and it will be dealt with in detail in the 5th chapter when we will be discussing the question whether the alienation of a debutter property is permissible.

8. (1921) 48 IA 302 Supra pp. 217-218.

pantheon is, as has been aptly called, a "juristic entity", vested with the capacity of receiving gifts and holding property."¹ But it is in the pronouncement of Lord Shaw in Pramatha Nath's case,² as pointed out above, that we find the clear view of the legal nature of a Hindu idol. So far as Hindu law is concerned nobody can question the proposition that a Hindu idol is a juristic person - which is well-established by a long series of judicial decisions.³

In Prosunno Mukari Debya v. Golab Chand Baboo⁴ the Judicial Committee held that "It is only in an ideal sense that property can be said to belong to an idol."⁵ Again, in Maharaja Jagadindra Nath v. Rani Hemanta Kumari⁶ where the issue was whether the right of the plaintiff as a shebait was barred by the provision of the Limitation Act (XV) of 1877, Sir Arthur Wilson observed for the Judicial Committee that "there is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held."⁷ These remarks as they stand are rather confusing: 'ideal' or not the sense is a legal sense. Yet the view has been reaffirmed by the Supreme Court in Deoki Nandan v. Murlidhar⁸ where Venkatarama Ayyar, J. pronounced that "It has

1. Ibid., p. 311.

2. AIR 1925 PC 139.

3. For example, Vidya Varuthi v. Balusami Ayyar (1921) 48 IA 302; Pramatha Nath v. Pradhyuna Kumar AIR 1925 PC 139; Tarit Bhusan v. Sridhar Salagram AIR 1942 Cal 99; Deoki Nandan v. Murlidhar AIR 1957 SC 133, 136; Jogendra Nath v. I-T Commr. AIR 1969 SC 1089, 1090: a detailed discussion of the case is offered below in the next sub-section; Kalanka Devi Sansthan v. M.R.T. Nagpur AIR 1970 SC 439, 441; Panna Banerjee v. Kali Kinkor AIR 1974 Cal 126, 146; Pooranchand v. Idol, Radhakrishnaji AIR 1979 MP 10, 11.

4. (1874-75) 2 IA 145.

5. Ibid., p. 152.

6. (1904) 31 IA 203.

7. Ibid., p. 209.

8. AIR 1957 SC 133. "The case, which is of great general interest, establishes the proposition that the dedication to an idol is for the benefit of worshippers. Here the 'Old' and the 'New' India overlap: the 'Old' see dedication as intended to produce merit (hence benefit) for the donor; the 'New' sees it as intended to conduce to the beauty and religious atmosphere of the shrine (from the point of view of visitors, not all of whom will be donors" - Derrett, RLSI, 484, footnote 2.

been repeatedly held that it is only in an ideal sense that the idol is the owner of the endowed properties."¹ The phrase "in an ideal sense" as referred to above, was given interpretation by Jenkins, C.J. as he then was, in his judgement in Bhupati Nath v. Ram Lal.² Thus his Lordship observed that the expression "in an ideal sense meant that the dedication to a deity is a compendious expression of the pious purpose for which the dedication is designed."³ This hardly less confusing formula is the ruling one to this day - over seventy years later.

The problem regarding the question whether an idol is a legal person cannot be said to have been solved beyond further discussion. Discussing both western theories on juristic persons and purvamimamsa doctrines, and approving the view expressed by Sir Asutosh Mookerjee, J., in Bhupati Nath's case⁴ S.C. Bagchi came to the conclusion that

"the juridical construct, applicable to a corporation sole, cannot apply to a deity in Hindu law. A deity is not a complete juristic person... Religious endowments can be assimilated to purpose-trusts..."⁵

But an endowment as intended in favour of a deity is never made for an abstract purpose nor is it made to a deity in a figurative sense as held by the Calcutta High Court.⁶ A gift to a deity "is always directed to the god indicating his name..."⁷ Again supporting the present position of the deity as a juristic person the late mimamsa scholar A.S. Nataraja Ayyar concluded

1. Ibid., p. 136.

2. ILR (1910) 37 Cal 128 (FB).

3. Ibid., p. 140.

4. Ibid.

5. Juristic Personality of Hindu Deities, Calcutta University Press, Calcutta, 1933, 78.

6. In Champa v. Panchiram AIR 1963 Cal. 551; where the question for determination was whether a dedication of land to a Hindu deity was a transfer of land within the meaning of the West Bengal Estates Acquisition Act, 1953 (West Bengal Act 1 of 1954). Bachawat, J. of the Calcutta High Court observed (at p.553) that the "dedication is a gift for a religious purpose, and in a figurative sense is a gift to the deity as the ideal embodiment and symbol of the religious purpose." See also Derrett, RLSI, 486, where the case was cited and the law was stated.

7. G-D. Sontheimer, "Religious Endowments in India: The Juristic Personality of Hindu Deities", Z.V.R. 67/1 (1964) 45-100, 71.

in his study¹ somewhat controversially that the juristic personality has been developed on safe foundations and we need not take the help of "the law of trusts for giving the idol a secure foundation...for the preservation, management and improvement of the endowments of the idol."²

But in so far as the law is concerned regarding the vesting of the dedicated property, B.K. Mukherjea's clarification of the legal position³ is plausible when he says that

"the deity stands as the representative and symbol of the particular purpose which is indicated by the donor; it can figure as a legal person and the correct position is that in that capacity alone the dedicated property vests in it."⁴

But, in practice, when a donor dedicates his property to an idol he relinquishes his property in the same way as he would have given it to somebody else with a secular motive. A Hindu dedicates his property to a deity with the purpose of receiving grace from the deity. An ordinary Hindu believes that the dedicated property vests in an idol in a real sense and not in an ideal sense. This view was nearly admitted by the Supreme Court in Jogendra Nath Naskar v. Commr. of I-T, Calcutta,⁵ when it was observed there that

"It is however possible that the founder of the endowment or the worshipper may not conceive on the highest spiritual plane but [actually] hold that the idol is the very embodiment of a personal God, but that is not a matter with which the law is concerned."⁶

The Supreme Court "declines to accept the man in the street's point of view" even when it admits that "the man in the street may well believe that property belongs to an idol."⁷

The controversy centring round the question, in whom does the dedicated property vest, springs from the fact that "the donor never declares the

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1. "Juristic Personality of Deities in Hindu Law", Vyavahara Nirnaya, A Journal of the Law Faculty, University of Delhi, 1954, Vol. 3, 106-177.
 2. Nataraja Ayyar, ibid., p.176.
 3. Derrett points out that J.C. Ghosh in his book (op.cit., 275), has fairly treated the legal position. RLSI, 485, footnote 1.
 4. B.K. Mukherjea, op.cit., 4th ed., 39.
 5. AIR 1969 SC 1089. Infra pp.147-148.
 6. Ibid., p. 1093.
 7. Derrett, Critique, 381.

person [as such] in whom the property is to be vested; all that he intends, is that the rents and profits of the dedicated property must be appropriated to the worship."¹ The fiction² that the deity is the juristic owner of the dedicated property has been introduced

"by lawyers and judges for convenience, but it is not absolutely necessary that the property must be deemed as vested in the deity or in a fictional person."³

In so far as a Hindu religious endowment is concerned, what is required is the machinery for the management of the endowed property to give effect to the intention of a settlor.⁴ For Hindus are not so concerned with the way the dedicated assets are spent⁵ as they are with their right to dedicate something to a deity. They make dedications to objects of dharma and it is the act of dedication which counts.⁶

b. Idols' Liabilities to Pay Taxes

One of the attractions of dedicating property to a public or a family idol was that a capital reserve could grow up out of which some section of the community or a selected few could benefit. A public temple could serve as a bank or a private endowment might have a similar function on a smaller scale.⁷ Taxation as a source of revenue existed in India before the British

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1. G. Sarkar Sastri, Treatise on Hindu Law, 6th ed., Eastern Law House, Calcutta, 1927, 785. 'As such' is inserted by me to clarify the sense.
 2. But the "fiction" was not introduced by British judges or British courts in the Indian legal arena and Laik, J.'s view on this point as expressed in Commr. I-T, Calcutta v. Jogendra Nath, AIR 1965 Cal 570, 596, is not well-founded. The concept was popular long before "it became a part of the Anglo-Indian law" - Derrett, RLSI, 484-5.
 3. G. Sarkar Sastri, op.cit., 6th ed., 785.
 4. Sontheimer, op.cit., 99.
 5. Chhotabhai v. Jnan Chandra ILR (1935) 57 All 330 (PC), 343. The parties in the case were the members of the Radha Swami religion.
 6. Derrett, Critique, 376-7.
 7. J.D.M. Derrett, "The Liabilities of Deities to Pay Taxes", (1969) 71 Bom L R Jnl. 38-45, 39. See also Gurcharan Prasad v. Krishnanand AIR 1968 SC 1032. Facts revealed that the mahants pursued a moneylending business for a long time.

rule but bona fide dedications of lands to temples were exempt from land tax or were taxed nominally by the native rulers.¹

People would not mind if endowments were not taxed or were taxed nominally even after the introduction of the Income-Tax Act and Estate Duty but for the existence of two incompatible theories involved in a Hindu religious endowment. In the case of a debutter property the dedicated property vests in the idol as a juristic person but on the other hand the manager of an idol known as the shebait has a proprietary interest not only in his office but also in the assets² of the idol.³ "So the religious endowment was one way in which rich people could stay rich, and prevent their assets from being reduced like those of people who would not dispose of capital in that manner."⁴ So it could be used to perpetuate a socially privileged section of the community but recently the public, considering the nation's needs, began to feel it unwise to allow people to be shebait only to escape income-tax and estate duty. National calamities and national necessities could no longer be laid at the door of aggrieved deities, nor could pleasing deities be an alternative to contributing to the nation's coffers.

Prior to the amended provision of the Income-Tax Act, 1961 religious endowments enjoyed several tax advantages.⁵ After the introduction of the Income-Tax Act, 1961 these privileges have been reduced.⁶ In particular,

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1. Derrett, "The Liabilities of Deities to Pay Taxes", op.cit., 39.
 2. "The contortions through which the law has gone attempting both to admit, and to limit, the shebait's right of property not merely in his office but also in the assets or income of the idol, are a prime example of the Anglo-Hindu law's unreality and inability to come to terms with itself or with facts. A law made up of individual cases arising sporadically and unpredictably can be expected to produce such confusion, and readers who knew the Anglo-Hindu law as it was a while prior to 1955/6 will confirm that it was a repellent mess of ill-digested theories and misunderstandings" - Derrett, Critique, 383.
 3. Angurbala v. Debabrata AIR 1951 SC 293; Moti Das v. S.P. Shahi AIR 1959 SC 942.
 4. Derrett, "The Liabilities of Deities to Pay Taxes", op.cit., 39.
 5. Ibid.; N.N.Kher, "Tax Exemption in Ancient India", Indian Historical Quarterly (1963), 59-68 as cited in the above article at p. 39.
 6. R. Dhavan, "The Supreme Court and the Hindu Religious Endowments 1950-1975", (1978) 20 JILI, 52-102, 60.

the advantages of private religious endowments i.e. the exemption of private religious endowments from paying income tax, in comparison with those of public religious trusts seem to be negligible in the sense that only that portion of the income of the debutter which is actually spent for religious purposes is exempt from income tax.¹ It is said that this is justified on the ground that an endowment can make a fraud dodge the revenue department.² No wonder examples of fraud on the revenue department or manipulations through endowments could be traced even in medieval India, where a settlor used to make endowments in such a way that his nominees took the benefits of the endowments tax free.³

Before 1961, religious endowments were governed by sec. 4 (3) of the Indian Income-tax Act, 1922 (Act 11 of 1922).⁴ That provision made the Act (of 1922) inapplicable to the following:

- (i) "any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, in so far as such income is applied or accumulated for application to such religious or charitable purposes as relate to anything done within the taxable territories, and in the case of property so held in part only for such purposes, the income applied or finally set apart for application thereto";
- (ii) "the case of income derived from business carried on on behalf of a religious or charitable institution, unless the income is applied wholly for the purposes of the institution..."
- (iii) "any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes."

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1. See C.I.T.W.B. v. Jagannath Jew AIR 1977 SC 1523, 1536, cited below, this section, where the observation of K. Iyer, J. has been quoted and which is to the effect that the portion of the income which is actually spent for religious purposes is exempted from being assessed; see also the AlR Manual, Vol. 11, AIR Ltd., Bombay, 1971 S13 N1, pp. 1192-1193 where it is mentioned that cases under the Income-Tax Act, 1922 have to be viewed in the light of sec. 13 of the Income-tax Act, 1961, which inter alia provides that the income of a private religious endowment is liable to assessment. S 13 N1 of the AIR Manual refers inter alia to C.I.T. Madras v. Estate of late Sri T.P. Ramaswami Pillai (1962) 46 I TR 666 where it was held that the portion of the income of the trust applied for religious purposes was exempted from being assessed.
 2. K.D.Gaur, "Crimes Relating to Income Tax in India" (unpublished Ph.D. Thesis) London University, 1971. In his opinion the law must be more rigorous "to stop tax dodgers". See p. 124.
 3. Derrett, ECMHL, Vol. 1, Leiden, E.J. Brill, 1976, 260-264.
 4. See next page.

At present, exemption relating to incomes of religious endowments is governed by the provisions of secs. 11-13 of the Income-tax Act, 1961 (Act 43 of 1961). The provisions may be summarised as follows:

- (i) The property from which the income is derived must be "held under trust wholly for charitable or religious purposes..."
- (ii) The "income derived from" such a property "to the extent to which such income is applied to such purposes in India..."
- (iii) The accumulated "income derived from property held under trust wholly for charitable purposes" is exempt "to the extent to which the income so accumulated is not in excess of twenty-five per cent of the income from the property or rupees ten thousand, whichever is higher."
- (iv) Where the property is "held under trust in part only" for charitable or religious purposes and the trust is created before 1st April, 1962, and when any income from the property so held "is finally set apart for application to such purposes in India", that income is exempt "to the extent to which the income so set apart is not in excess of twenty-five per cent of the income from the property held under trust in part..."

Sec. 11 of the 1961 Act deals mainly with the circumstances when and to what extent a religious or a charitable endowment can claim exemption.

Sec. 12 provides a special case where an endowment can claim exemption. Thus, when any income of a trust for charitable and religious purposes is derived from voluntary contributions and that income is applied wholly for such purposes, it is not subjected to taxation.

Sec. 12A. This section was not originally under the Act (of 1961); it was inserted by the Finance Act,¹ 1972. The section provides inter alia that a trust to claim exemption of its income from tax "should get itself registered with the Commissioner within the time prescribed by s. 12A...

(The Commissioner has discretion to entertain an application for registration filed out of time)."²

(from previous page)

4. For a critical and constructive approach to the endowments/income-tax issue see Derrett's article, (1969) 71 Bom LR 38-45. See T.V. Viswanatha Aiyar "Taxation of Charities and Trusts" in Proceedings of Seminar...1963. Madras Provincial Bar Federation (1964), 321-41. In that article Viswanatha Aiyar explains the effects of Income-tax Act 1961 from the conservative point of view. See Derrett, "The Liabilities..." cited above,⁴⁰
1. N.A. Palkhivala and B.A. Palkhivala, Kanga and Palkhivala's The Law and Practice of Income Tax, Vol. I, 7th ed., N.M. Tripathi, Bombay, 1976, 288.
2. Palkhivala and Palkhivala, ibid., p. 259.

Sec. 13 provides the following cases where exemption is not granted under the present Act:

(I) Any income "from the property held under a trust for private religious purposes which does not enure for the benefit of the public."

(II) If the income of a trust for religious or charitable purposes created after 1st April, 1962, is "for the benefit of any particular religious community or caste" or the benefit of the trust so created is for direct or indirect benefit of the author or his relatives.

In the sixties several important cases relating to disputes over the right of taxing deities' properties came to the High Courts and in one case,¹ the Supreme Court had to give its deliberations on the question whether a Hindu deity was assessable to income-tax.

In I-T Commr. v. Jogendra Nath,² a case the decision in which was affirmed by the Supreme Court, is also very important for the purpose of the present topic, the main point for determination was whether the assessments of the deities in question through the shebait under sec. 41 of the Income-Tax Act, 1922 were in accordance with law. Before we go into the details of the case it may be pointed out that the law to be applied in the present case was the Income-tax Act, 1922. Under sec. 41 of that Act, names of some specific classes of persons e.g. Wards of Courts, were mentioned and through whom income-tax could be assessed, but the name of the shebait as such was omitted in the section. P.B. Mukharji, J., as he then was, pronounced for the Calcutta High Court that "on the facts and in the circumstances of the case the assessments of the deities through the shebait under the provisions

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1. Jogendra Nath v. Commr. of I.T. AIR 1969 SC 1089. Below, next page. But see Derrett's criticisms of the judgement which are severe but constructive and very few will disagree with them. In his opinion Jogendra Nath's case is "The most interesting Supreme Court judgement which without in any way departing from the previous case-law, sought to explain why income-tax is payable on behalf of a deity, has obfuscated rather than illuminated in the declared interest of accuracy" - Critique, 379.
 2. AIR 1965 Cal 570. See Derrett's critique of the two separate judgements of both P.B. Mukharji and Laik JJ. of the Calcutta High Court in his "The Liabilities of Deities...", op.cit., 41-43.

of sec. 41 of the Indian Income-tax Act were in accordance with law...."¹
 In the same case, though Laik, J. shared the same view with Mukharji, J. relating to the interpretation of sec. 41, his Lordship rejected the opinion that a Hindu deity as such was liable to income-tax.² But when the case, Jogendra Nath v. I-T Commr. Calcutta,³ came on appeal to the Supreme Court, Ramaswami, J. upheld the view⁴ of Mukharji, J. and observed for the Court that

"there is no principle why a deity as such a legal person should not be taxed if such a legal person is allowed in law to own property even though in the ideal sense and to sue for the property, to realise rent and to defend such property in a Court of law again in the ideal sense. Our conclusion is that the Hindu idol is a juristic entity capable of holding property and of being taxed through the shebait who are entrusted with the possession and management of its property."⁵

It is submitted that the decision of the case is not helpful to the body of worshippers.⁶ Religious endowments are to be protected not for the sake of deities who neither really possess them nor enjoy the benefits of the endowments but for the spiritual needs of the body of worshippers. The judgement of the case has been drawn in such a way as to increase the amount of revenue of the state⁷ by extracting money from the religious endowments. Should religious endowments be taxed specially heavily, such endowments will be reduced in number and amount; as a result it will not be the deities who will suffer but rather the worshippers whose benefit will be correspondingly reduced; fewer temples will be built and as a result fewer places will be available for the worshippers to satisfy their spiritual instincts.⁸

1. AIR 1965 Cal 570, 579.

2. Ibid , p. 597.

3. AIR 1969 SC 1089.

4. The Supreme Court reiterated the view in Off. Trustee v. Commr., Income-tax (1974) 93 ITR 348 (SC).

5. AIR 1969 SC 1089, 1093.

6. With due respect I disagree with the view expressed by Gaur that this decision is above criticism. See K.D.Gaur, op.cit., 119.

7. Derrett, Critique..., 379.

8. "Gifts for offerings to a deity, worship and ritual, and the paraphernalia of a divine court on earth imitating the supposed divine court in heaven, must be maintained by kings because unless this worship is properly performed the supernatural health of the kingdom will fail" - Derrett, ibid., pp. 377-378.

Earlier the Calcutta High Court, in Sri Sridhar v. I-T Officer,¹ did not accept the submission of the plaintiff that as the Income-tax Act of 1961 provided expressly for the assessment of the income of a juridical person like a deity, as there had been no such express provision in the 1922 Act (Income-tax), it was not within the contemplation of the Act of 1922 to subject the income of the deity to taxation. The Court referred inter alia to the decision in Commissioner of Income-tax v. Sodra Devi.² In Sodra Devi's case, the point for determination was whether the word "individual" as embodied in sec. 16(3) of the 1922 Act included also a female and whether the income of minor sons from a partnership business would be liable to be included in the income of the mother who was also a partner in the business. In the present case, Banerjee, J. quoting from the observation of Bhagawati, J. in Sodra Devi's case³ held that

"!...the word 'individual' has not been defined in the Act and there is authority for the proposition that the word 'individual' does not mean only a human being but is wide enough to include a group of persons forming a unit. It has been held that the word 'individual' includes a corporation created by a statute, e.g. a university or a bar council or the trustees of a baronetcy trust by a Baronetcy Act...."

"To the list appearing in the quotation above, an idol or a deity may not be an unnecessary addition. ... Now, if a baronetcy trust can be an individual, there is no reason why a religious trust, namely an estate dedicated to an idol and the spiritual object which is the holder of the property, may not be an 'individual'".⁴

Hindu religious endowments, which were not created through any trust, used to fall within the scope of the words "other legal obligation" in sec. 4(3)(1) of the old Act of 1922. Any income, derived from property held in trust or other legal obligation, which was meant for applying wholly for religious purposes, used to fall within the purview of exemption cases under sec. 4(3)(1). In Shree Shree Iswar Gopal Jiew v. Commr. of

1. (1963) 50 ITR 480 = AIR 1966 Cal 494.

2. (1957) 32 ITR 615 (SC).

3. Ibid., p. 620.

4. (1963) 50 ITR 480, 483.

Income-tax,¹ the question arose whether the income of the deities in question was liable to income-tax. Sinha, J. relying on the decision in Tribune Trustees v. Income Tax,² a case where Sir George Rankin held that the phrase "other obligation" of sec. 4(3) would include Hindu religious endowments and Muslim wakfs, observed that

"Hindu endowments which are not through the medium of trust are included in the words 'other legal obligation'.... But if they are religious they can only be effected if they can be said to be 'private religious trusts'. In any other case, income derived from property held under a legal obligation to apply it wholly for religious purposes is within the ambit of the exemption in section 4(3)(1)."³

The High Court did not also approve the view that the shebait of the deity could be assessed as a guardian of the deity under sec. 40 of the Income-tax Act, 1922. The judgement of the present case was in effect opposite to the views held in the aforesaid two cases of the Calcutta High Court where it was held that the deity would be liable to pay income tax i.e. the income of any endowment would be subject to income-tax.

Again, a unique approach has been made in I-T Commr. v. Uma Maheswari⁴ where the point for determination was whether a Hindu deity as owner of property could claim earned income relief under the Income-tax Act, 1922. The Patna High Court held that

"for all legal purposes, the shebait and the idol are one; any income earned by the shebait...while functioning as the shebait of the deity must be deemed to be the income earned by the idol. The separation of the personality of the shebait from that of the idol for the purpose of applying the provisions of the Act will not be in consonance with the Hindu law."⁵

Next, one of the advantages of religious endowments is that they do not die. Like other secular establishments they are not subject to estate duty and if they are also business concerns⁶ they are in a more advantageous

1. (1950) 18 ITR 743. 2. (1939) 7 ITR 415 = (1938-39) 66 IA 241.

3. (1950) 18 ITR 743, 751. 4. AIR 1969 Pat. 95.

5. Ibid., pp. 96-97.

6. Gurcharan Prasad v. Krishnanand, AIR 1968 SC 1032. See above p.143. See also Guru Estate v. Commr. of Income-Tax, AIR 1963 SC 1452, where Pandas collected money from the pilgrims to utilise the amount for the bhog of Jagannathji to be enjoyed by them and the people of the district to which the donors belonged.

position than Hindu business enterprises such as firms and Hindu joint family businesses, because the latter are subject to estate duty losing some of their capital every time a partner dies.¹ In Pran Krishna v. Controller, Estate Duty² the donor dedicated some of his house property to the family deity absolutely with the exception that he reserved a right of residence in one portion of the ground floor of the house. After the death of the donor, the Asst. Controller, Estate Duty, argued that the properties were subject to assessment under the provisions of the Estate Duty Act, 1953. When the case came to the Board of Revenue the Board also did not accept the contention of the applicant that the property in question was absolute debutter. On appeal the High Court of Calcutta came to the same conclusion that as the settlor did not divest himself of a part of the property, that is to say that the settlor reserved his right of residence in one part of the property, estate duty was payable on that part of the property.

The decision in that case seems to be a sound one, but there could be a serious implication if some remarks of that judgement were given effect. In Angurbala's case³ the Supreme Court laid down the rule that the shebait had a proprietary interest in an idol's properties and this was referred to in the decision of the present case. Though the remarks were obiter it must be taken seriously because they involve a judicial opinion.⁴ The obiter observation may be reproduced below:

"If this (i.e. the shebait's ownership) be the position of a shebait then whether he retained some sort of interest in the debutter estate, expressly under the deed of endowment, e.g., as in the instant case, a right of residence in one of the houses; or whether he did not do so, but merely constituted

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1. Derrett, "The Liabilities of Deities...", op.cit., 43.
 2. AIR 1968 Cal 496 See the evaluation of the judgement of the Calcutta High Court by Derrett (at pp. 43-45) of the article mentioned above.
 3. AIR 1951 SC 293. This is the most important case for the purpose of this thesis. See below, p.219.
 4. Derrett, "The Liabilities of Deities...", op.cit., 44.

himself as the shebait, that fact alone will endow the shebait with some sort of beneficial interest in the dedicated property and by functioning as the shebait he would be enjoying some beneficial interest in the properties dedicated to the deity. This would attract the mischief of section 10¹ of the Estate Duty Act because it cannot be said that a shebait after dedication ceases to have any benefit or enjoyment in the dedicated property."²

In my opinion the above exposition of law involved in the decision in Angurbala v. Debabrata³ and the logical conclusion as derived from that decision is correct, but the implications of such an exposition of law are unquestionably devastating. All properties of deities may be subjected to estate duty whether or not a shebait expressly reserves any right in them, because he has a beneficial interest in the properties and the dedicated properties will be deemed to pass after he dies. "In course of time all idols' estates would pass to the Government of India."⁴

It is submitted that the actual decision in Fran Krishna's case⁵ is sound. It is implied in the decision that when the settlor dedicates his property along with all the interests in it the property is exempt from estate duty but if he reserves any interest to himself, in that case the property will be liable to estate duty to the extent affected by that interest.

However, a provision giving a right of residence to the shebait for the purpose of carrying out worship of the deity itself will not change the absolute character of a dedication.⁶ Thus in Sree Sree Iswar Sridhar Jew v. Sushila Bala⁷ where the point for determination was the construction of

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1. Sec. 10 of the Estate Duty Act, 1953 reads: Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise....
 2. Per Banerjee, J., 503.
 3. AIR 1951 SC 293.
 4. Derrett, "The Liabilities of Deities...", op.cit., 44.
 5. AIR 1968 Cal 496.
 6. Gnanendra v. Surendra AIR 1920 PC 27. In that case the will in question was challenged on the ground that there was no valid dedication for religious purposes. It was provided in the will that the shebait for the time being would reside in the house which was dedicated to the family idols.
 7. AIR 1954 SC 69.

the will i.e. to find out whether the dedication involved was absolute or partial, the Supreme Court held that a provision giving shebait the right to reside in the properties dedicated to a family idol to carry out religious worship does not change the quality¹ of the dedication from absolute to partial. But recent decisions² in some cases suggest that the Court may so construe a dedication as to secularise property which otherwise would be absolute debutter, free from the rules against perpetuity, and so increase assets available for assessment to taxation. In Jadu Gopal v. Pannalal³ where the point for determination was the interpretation of a trust, it appears that keeping social needs in view, the Supreme Court in construing the grant in question as partial debutter, leaned against absolute debutter, thus enlarging the amount of property assessable to the revenue laws as property of individuals.

Now public religious endowments, because of their element of public or sectional utility are exempt to some extent, as we have already seen, even from paying income tax. But no income tax statute is more lenient to public religious endowments than the Madras Agricultural Income-tax Act (Act 5 of 1955). In Madras, religious endowments are exempt from paying agricultural income tax for the income of the lands held in trust wholly for religious and charitable purposes. The Act seems to be so liberal that it is not concerned at all with the way the income is spent except how the lands are held. The provisions of granting exemption of income-tax to religious endowments are embodied in sec. 4 of the Madras Act. In Sadayapillai Trust v. Agricultural I-T Officer,⁴ the Madras High Court rejected the view of the commissioner of Agricultural Income-tax that "if any excess out of the income derived from the properties remained after the performance of the

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1. The view was accepted in Nirmala Bala v. Balai Chand AIR 1965 SC 1871, 1883, a case concerning construction of a will.
 2. For example, Jadu Gopal v. Pannalal AIR 1978 SC 1329 and Phani Busan v. Kenaram Bhunia AIR 1980 Cal 255.
 3. AIR 1978 SC 1393. See below, section 3b of this chapter.
 4. AIR 1967 Mad 396.

objects of the trust, such excess income might be appropriated for himself by the turn-trustee for the time being."¹ But instead Veeraswami, J. referring to two decisions² held that

"Reading the document in its entirety and having regard to the substance and extent of dedication, there is no doubt that this was a case of endowment of the entirety of the properties and the same as a whole being held as trust. The properties, therefore, fall within the first limb of sec. 4."³

Derrett's view⁴ that "any part of the income for the expense of worship and the god's needs (depreciation of the temple structure, etc.) should be exempt from assessment to revenue..."⁵ seems to have found expression in the decision in C.I.T. W.B. v. Jagannath Jew⁶ where K. Iyer, J. ruled that "we may state that all income earmarked for religious and charitable purposes conforming to sec. 4(3)(i) read with Explanation to sec. 4(3) of the 1922 Act shall not be included in the total income."⁷ Moreover, the Supreme Court's ruling⁸ that shebait's income from remuneration and other allowances (e.g. personal use of carriages, horses, etc.), to be provided out of the income of the debutter, can be included in the total income of the deity,⁹ for the purpose of income-tax assessment, is commendable. Otherwise a shebait's personal income would be income-tax free in contrast to the personal income of a person having no connection with any Hindu religious

1. AIR 1967 Mad 396, 396.

2. M. Dasaratharami Reddi v. D. Subba Rao AIR 1957 SC 797, the subject-matter of which was whether the dedication involved in the will in question was complete or partial. Vadivelu Mudaliar v. N.S. Rajabada AIR 1967 Mad 175, a case dealing with the construction of a will.

3. AIR 1967 Mad 396, 397.

4. One may wonder why B.K. Mukherjea's or Varadachari's book has not yet been referred to in this section. With due respect to the learned authors, the writer has not got any help from their works for this section and is obliged to point out that no critical approach has been made in their books. See Mukherjea, op.cit., 4th ed., 518-533 and V.K. Varadachari, op.cit., 2nd ed., 322-334.

5. Critique, 389.

6. AIR 1977 SC 1523.

7. Ibid., p. 1536.

8. Read 1536 with 1527.

9. The same view was held by the Patna High Court in Commissioner of I.-T., Bihar v. Uma Maheshwari AIR 1969 Pat 95. See above, this section.

endowment and that would have been discriminatory. A shebait's income from the debutter is generally spent in the same way as any other person's income (e.g. for maintaining his family and himself). It may be suggested that all income of the debutter not spent by the shebait on the debutter purposes (worship, repairs, etc.) should be deemed as the shebait's and assessed along with his other income for tax purposes.

Again, the capital necessary to defray expense concerning the maintenance of the temple should be exempt from estate duty because that capital "cannot be deemed to belong to the shebait beneficially."¹ So the actual decision in Pran Krishna's case² is commendable. As long as worship is performed out of the income of a genuine private endowment, there is, according to Hindu law, jagathitam involving public benefit.³ "Hindu law, according to the original sāstras...never made any distinction between public and private religious purposes.

"Religion, according to Hindu sāstras...is always for universal good and universal welfare. Dedication whether made by an individual or otherwise privately is always for the good of the universe, 'jagathitaya'".⁴

In so far as Hindu religious endowments are concerned legislators should not be deceived into thinking of an endowment as private as opposed to public because a private endowment is a well accepted legal institution of Hindus!

"The Hindu view of the character of private endowments must be accepted at its face value. Thus, only the surplus income is properly assessable to tax. And by the same token it is less desirable to have, as at present, a fixed proportion of the income of a public endowment freed of income-tax, than to have a valuation in each case of the income not spent on worship and the maintenance of the endowment."⁵

Now even imposition of the maximum level of tax on the surplus amount will

1. Derrett, Critique, 389.

2. AIR 1968 Cal 496.

3. Derrett, Critique, 389.

4. Per Laik, J. I-T Commr. v. Jogendra Nath AIR 1965 Cal 570, 583.

5. Derrett, Critique, 390.

not do any harm to the purpose of any endowment. As long as the worship of the deity is not hampered, it is better for society to get the means to fulfil its other commitments. The Hindu religion does not evaluate the pleasing of the deities in terms of the amount actually spent on worship - the latter reflects, or creates, the social standing of donors in which the law is not interested. A problem may be thought to arise if an endowment is made out of an untaxed amount or an amount which has been earned immorally. In such a case, if the donor divests himself of all the interests in the amount in favour of the deity, the income-tax department cannot assess the dedicated amount because the deity not the founder is the owner of the amount. Here in so far as the deity is concerned the money is not the income of the endowment, it is the capital amount. The Court cannot declare it an illusory endowment, for it is not a device to dodge revenue or any other laws. It is suggested that in such a case, the assessee alone be or his legal representative should be looked to for payment of tax. Or, an endowment may be redefined as valid only when it is made out of a legally earned and taxed amount or a property bought out of that amount. The mimamsa however is clear that illegality or immorality does not attach to assets when transferred¹ and if the law does not provide for the following of the funds the assets are effectively dedicated.

1. Derrett, RLSI, 5th chapter, 144 - 145, see also p. 134.

Section 2. FORMALITIES OF DEDICATION TO IDOLS.

When benefits are sought to be obtained from a debutter the starting point in any dispute that arises are the questions whether, when, by whom and to what effect dedication was made.

When a property is dedicated to an idol a Hindu generally performs the usual religious ceremonies of sankalpa (the formula of resolve) and samarpana (delivery).¹ But the performance of these ceremonies is not essential in creating a valid endowment.² In both these cases the ceremony includes recitation of hymns and delivery of prescribed articles either on the ground or to the person considered to be the recipient of the gift of the endowment.³ But the presence of ceremonies is merely a corroborating factor for the purpose of determining the real intention of the donor.⁴ In Pinchai v. Commr. H.R. & C. Endowments Board,⁵ where the power of the Deputy Commissioner, Religious Endowments Board, to frame a scheme under the Madras Hindu Religious Endowments Act (Act 22 of 1959) was challenged, the Madras High Court ruled that "An endowment can be created by making a dedication pure and simple without any provision for performance of ceremonies."⁶

The question whether there has been any dedication is to be determined on the basis of the evidence produced in each case. In Idol Murli Manoharji v. Gopilal⁷ where the main point for determination was whether or not the suit property was a dedicated property, Lodha, J. spoke for the Rajasthan High Court that

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1. For the meanings of Sankalpa and Samarpana see Mayne's Hindu Law, op.cit., 11th ed., 921.
 2. Mulla, op.cit., 14th ed., 480; V.K. Varadachari, op.cit., 79.
 3. M.N. Srinivasan, op.cit., vol. 3, 4th ed., 2505.
 4. B.K. Mukherjea, op.cit., 4th ed., 106.
 5. AIR 1971 Mad 405.
 6. Per Krishnaswamy Reddy, J., ibid., p. 410.
 7. AIR 1971 Raj 177.

"the law seems to be well settled that even in the absence of a document and ceremony such as sankalpa or samarpana dedication may be established by other evidence. The question whether there has been a dedication of a certain property to a temple is a question of fact to be determined on the basis of the evidence produced in each case."¹

In order to constitute a valid dedication it is necessary that the settlor should have completely divested himself of the interest dedicated. There should be an unambiguous expression of intention on the part of a donor of the divestment of the interest dedicated.² It is the intention of a settlor which is the most important test of a valid dedication and it is this point which has been given stress by the Supreme Court in Decki Nandan v. Murlidhar³ where Venkatarama Ayyar, J. held that

"an endowment can validly be created in favour of an idol or temple without the performance of any particular ceremonies, provided the settlor has clearly and unambiguously expressed his intention in that behalf."⁴

A mere intention to dedicate property is not sufficient, the settlor must part with his rights in the property dedicated,⁵ and whether he has expressed his intention unambiguously can be deduced from his conduct or from the conduct of his nominees.⁶

Again, a dedication is valid even if it is made verbally.⁷ No writing, nor any specific kind of 'deal' is necessary to constitute a valid Hindu religious endowment⁸ and the performance even of once considered indispensable formalities is not necessary for the purpose of a dedication.⁹ But there should exist clear evidence of such an endowment. Thus in Konwur Doorganath v. Ram Chunder Sen¹⁰ the subject-matter of which centred upon the question of the possession of a Mehal, the Privy Council held that a party seeking a declaration, for setting aside an alienation of lands on the ground that the lands were debutter, must produce strong evidence of existence of an endowment.

1. AIR 1971 Raj 177, 180.

2. State of Madras v. S.S.M. Paripalana Sangham AIR 1962 Mad 48.

3. AIR 1957 SC 133. Supra p. 140.

4. Ibid., p. 140.

5. Venkatachalapathi v. China Muna (1922) 42 MLJ 258.

6. Govt. of Madras v. A.S. Navaneethakrishna Pillai AIR 1971 Mad 472.

7. Shri Govindlalji v. State of Rajasthan AIR 1963 SC 1638. See above, sec. 1a of the 1st chapter. Mayne's Hindu Law, op.cit., 11th ed., 920.

8. R.V. Reddiar v. Krishnaswamy AIR 1971 Mad 262.

9. Kisha Singh v. Mathura Ahir AIR 1972 All 273. 10. (1876) 4 IA 52. Infra p. 208.

In Ramchandra v. Shree Mahadeoji¹ where the main question for determination was whether the trust in question as created for maintaining an akhara (perpetuity) was a valid religious trust, Shelat, J., summed up the important elements of a dedication:

"A dedication of property for a religious or a charitable purpose can, according to Hindu law, be validly made orally and no writing is necessary to create an endowment except where it is created by a will (cf. Dasaratharami Reddi v. D. Subba Rao, 1957 SCR 1122 at 1128 = AIR 1957 SC 797 at p. 800).² It can be made by a gift inter vivos or by a bequest or by a ceremonial or relinquishment. An appropriation of property for specific religious or charitable purposes is all that is necessary for a valid dedication."³

The principle as laid down in the said observation may be taken as virtually the exposition of law made long ago by the statement of West, J. in Manohar Ganesh's case⁴ that "A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it.... A trust is not required for this purpose...."⁵

In short, the most important element of dedication is the divestment or renunciation of property (utsarga) in favour of God with a clear intention that the income of the property will be applied for worship of the deity represented by a properly consecrated idol having its definite name in a defined place.⁶

1. AIR 1970 SC 458.
2. Gajendragadkar, J. as he then was, observed there that "The principles of Hindu law applicable to the consideration of questions of dedication of property to charity are well settled. Dedication of property need not necessarily be by instrument or grant. It can be established by cogent and satisfactory evidence of conduct of the parties and user of the property...." In that case the question for decision had centred upon a particular compromise decree.
3. AIR 1970 SC 458, 464.
4. ILR (1887) 12 Bom 247.
5. Ibid. p.263. The law was laid down in Jugget Mohini Dossee v. Sokheemoney Dossee, (1871-72) 14 MIA 289, 302.
6. Derrett, IMHL, 493.

Section 3. KINDS OF HINDU RELIGIOUS ENDOWMENTS

a. Real and Nominal Debutter

A dedication of property in favour of the deity must not be illusory,¹ it must be real. A religious endowment cannot be used as a cover to fulfil some secular purpose. Nominal debutters are known to the law and the properties of a nominal family debutter are certainly partible between members of the family.² In order to constitute a valid dedication, the donor must divest himself of the interests dedicated.³ But a mere intention to divest interests in a property evidenced by a deed or the mere execution of a deed is not enough; it must be shown that divestment has already taken place.⁴

In M.A. Ramanujacharyulu v. M. Venkatanarasimhacharyulu⁵ the settlor created an endowment of certain lands which fell to his share in the family division. Later on, he bought a building at a certain village in the name of his wife with the purpose of converting the building into a choultry and to run it for charitable purposes such as for the benefit of the poor passer-by and other deserving purposes. Again, to run the choultry a settlement of certain lands in the same village was also made by the settlor. The appellant filed the suit for a declaration that the properties as settled by the settlor for the purpose of maintaining the choultry were not endowed properties but they were joint family properties. In short, the point for determination was whether the suit properties were real or nominal debutter. Refusing to accept the plea of the appellant, Kondaiah, J. of the Andhra Pradesh High Court observed that

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1. Derrett, IMHL, 495. On this point see Sri Ganeshji v. Krishna (1960) ALJ 678. See also Niranjana Parasad v. Behari Lal (1929) ALJ 324.
 2. Dukhi Dibya v. Landi Dibya AIR 1978 Cri 182.
 3. Mulla, op.cit., 14th ed., 481.
 4. Lal Chand v. Vinayak Rao AIR 1953 Nag 351; Brojobala Dasi v. Sree Sree Saradiya Durgamata ILR (1953) 2 Cal 268; Mahani Dasi v. Pares Nath AIR 1954 Ori 198; Ram Charan v. Girijanandini AIR 1959 All 472; Sri Gopal Jiew Thakur v. Pravasina AIR 1967 Ori 85.
 5. AIR 1974 AP 316.

"An endowment can be created by the execution of a deed of dedication by the donor. But, however, it must be noted that the mere execution of a deed of dedication without the donor intending to act upon the terms of the deed, would not create a valid endowment. In other words, to constitute a valid endowment, it must be established that the donor intended to divest himself of his ownership in the property dedicated. An endowment may be real or nominal. Whether a particular endowment is real or nominal, is a question of fact depending upon the facts and circumstances of each case. In order to determine whether an endowment is nominal or real, the factors relevant and material are (i) whether in fact any endowment has been created or not, and (ii) the conduct of the parties and surrounding circumstances."¹

In Mahani Dasi v. Paresh Nath,² the main question to be decided was whether both the oral and the documentary evidence would warrant an inference that the properties in question were, in fact, dedicated to the deity. Panigrahi, C.J., rejecting the views held by the lower Courts, held that

"the Courts below have rested their decision relying on a recital of a deed to the effect that certain properties belong to the deity. But this by itself is not sufficient to prove that there had, in fact, been a dedication. To prove this fact it must further be established that the executants had intended to divest themselves of their ownership in the properties dedicated."³

To determine whether a particular dedication is real or nominal the conduct of the parties, i.e. their dealing with the endowed property, is an important factor.⁴ It must be remembered that "the Court will not protect a purporting gift in charity which is really a covert provision for the founder's nominees."⁵ In Thakurji v. Sukdeo Singh⁶ where the donor practically made an apparent dedication of his whole property to the deity, the Full Bench of the Allahabad High Court approving the finding of the Court of first instance that the whole transaction was not prompted by religious

1. Ibid., p. 317.

2. AIR 1954 Ori 198.

3. Ibid., p. 200. It may be pointed out that this decision of the Orissa High Court was reversed by the Supreme Court in Paresh Nath v. Mahani Dasi (1960) 1 SCR 271, 273, on a technical ground that "a High Court, on second appeal, cannot go into questions of fact, however erroneous the findings of the fact recorded by the Courts of fact may be."

4. Ramchandra v. Ranjit Singh ILR (1900) 27 Cal. 242, 251.

5. Derrett, IMHL, 495.

6. ILR (1920) 42 All 395 (FB).

motives held that "the donor's motive was to tie up the property and to render such property inalienable for generation after generation."¹

In Durga Prosad v. Sri Sri Rameswar Jew Siba Thakur,² a Hindu widow, a limited owner, purported to dedicate a substantial portion of landed property to the deity by executing a deed arpannama (a deed of dedication) exceeding her limit to alienate the property. In this connection it may be pointed out that a Hindu female could under the system generally obtaining until 1956 validly alienate or dedicate only a fraction of the property, of which she was a limited owner, for the benefit of the soul of the deceased owner.³ In the present case, the Court of first instance accepted the version of the plaintiff that the widow's eldest son obtained the fictitious document of dedication from his mother who could not understand its contents, and decreed the suit. The document would have given, in practice, to the widow's sons control and ownership over a substantial portion of the property. But the appellate Court reversed the decision of the lower Court and accepted the document as a valid one without evaluating the subsequent conduct of the parties. The High Court of Calcutta rightly reversed the decision of the lower appellate Court and upheld the verdict of the original Court. Maitra, J. delivering the judgement for the Court pronounced that

"the document...purported to create an illusory endowment and she did not intend to divest herself of the property.... I further hold that she exceeded her limit by making such improper alienation, that the disputed deed...was not acted upon and it was a sham and paper transaction."⁴

A classic example of illusory endowment is Niranjan Prasad v. Behari Lal.⁵

1. Ibid., p. 400.

2. AIR 1981 Cal. 92.

3. Sardar Singh v. Kunj Bihari Lal AIR 1922 PC 261. The point for determination was whether a Hindu female on whom the property devolved upon the death of the husband or son or father as a limited estate could alienate any part of the property for religious purposes. Mr. Ameer Ali (at p.266) pronounced for the Judicial Committee that "Hindu law recognises the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner."

4. AIR 1981 Cal. 92, 94-95.

5. AIR 1929 All. 302.

In that case the testator disposed of the whole of his property in a will and out of that property he purported to dedicate some items to the deity. It was found that the shebait used the endowed property in such a way as rather to satisfy their secular motives than to fulfil the purposes of the endowment. The shebait did not even keep any accounts of any income of the property. Declaring the endowment a nominal one the High Court of Allahabad ruled that

"We are not satisfied that any expenditure whatever has been incurred for the purposes of worship etc. of the idol and in our opinion the endowment is purely illusory or colourable. The testator's intention was to preserve the property in his family and to let his two sons and their descendants enjoy the income of the property without having the power of alienation."¹

Again, in Ganga Narain v. Brindaban² where the issue to be decided was whether the dedication was bona fide or nominal, the testator, within a fortnight of the endowment, transferred half the endowed property to his brother. The finding of the Court was that the settlor simply treated his property as his own, so it was held that the endowment was a nominal one.

To constitute a real debutter the intention of the donor to divest himself of property might be an important factor but it is not enough. He must act to show that actual divestment has occurred. In Watson & Co. v. Ramchand³ where two deeds of endowment by one Padmalochun were executed but not acted upon, the Judicial Committee ruled that

"it was not the intention of Padmalochun or of his brothers that the deeds should be acted upon, or that Padmalochun should thereby divest himself of his share of the property. The deeds were fictitious...."⁴

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1. Ibid., p. 304. In Tagore v. Tagore (1872-73) IA Sup Vol. 47, the Judicial Committee held that a Hindu could not dispose of his property by a bequest to a person who was not born in fact and in law at the moment of his death. But this rule of Hindu law was modified by several statutes inter alia by the Hindu Disposition of Property Act, 1916 (now repealed). See Derrett, IMHL, 464-465. Now the Hindu Transfers and Bequests Act, 1960 applies to the whole of India except the state of Jammu and Kashmir. According to this Act a gift to an unborn person is valid. However, such a gift should not offend the rule against perpetuity. See Derrett, IMHL, 465; Diwan, op.cit., 2nd ed., 453.
 2. (1883) 3WR 142. 3. ILR (1881) 18 Cal. 10 (PC). 4. Ibid., p. 18.

In other words, a dedication may well be construed as invalid if the profits of the endowment are spent not for the purpose of worship of the deity but for the benefit of the donor and his nominees.¹

But the evidence that only some portion of the income of the endowment has been spent for worship of an idol is not enough for the determination of the character of the property as debutter. In Konwur Doorganath Roy v. Ram Chunder Sen² the Privy Council held that the mere fact that the rents of a particular property had been applied to the worship of an idol for a long time was not by itself sufficient to establish that the property was debutter.³ To retain discretion whether to apply or not is to argue that dedication did not occur.

In order to show that a particular dedication was a real not a nominal one the conduct of the parties (i.e. how they have dealt with the endowed property) is an important factor⁴ and the fact that the settlor and his nominees have not used the property for their own use warrants an inference that the dedication is a real one.⁵ In Abhiram v. Shyama Charan Nandi⁶ in which the main question to be decided was whether the mouzah in question was debutter, Sir Andrew Scoble observed for the Privy Council that

"the mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose... but it is a fact that may well be taken into consideration...."⁷

Though the subsequent conduct of the donor or his nominees is important to establish the intention of the donor or of his nominees, it is not sufficient to determine the validity or invalidity of a dedication. For,

1. Sree Sree Iswar Lakshmi v. Kshitish Chandra (1932) 55 CLJ 26, 31.

2. (1876-1877) 4 IA 52.

3. Ibid., p. 60-61.

4. The point that the subsequent conduct of the party is an important factor has been stressed in Durga Prosad v. Sri Sri Rameswar Jew Siba Thakur AIR 1981 Cal. 92, 94; Ganga Narain v. Brindabun Chunder (1883) 3WR 142.

5. Sri Sri Gopal v. Radha Binode AIR 1925 Cal. 996.

6. (1908-09) 36 IA 148.

7. Ibid., p. 164.

naturally, when the intention of the donor is established a mere breach of a trust of a shebait in dealing with the endowed property contrary to his terms of appointment will not invalidate a dedication.¹ In Sree Sree Iswar Sridhar Jew v. Sushila Bala² where the main contention of the defendants (appellants in the Supreme Court) was that the suit properties were not debutter³ and where they claimed adverse possession of the suit properties, approving the observations of Rankin, C.J., as he then was, in Surendra Krishna v. Iswar Bhubaneswari,⁴ Bhagwati, J. held that

"We are in perfect accord with the observations of Rankin, C.J. If a shebait by acting contrary to the terms of his appointment or in breach of his duty as such shebait could claim adverse possession of the dedicated property against the idol it would be putting a premium on dishonesty and breach of duty on his part and no property which is dedicated to an idol would be safe. The shebait for the time being is the only person competent to safeguard the interest of the idol, his possession of the dedicated property is the possession of the idol whose shebait he is, and no dealing of his with the property dedicated to the idol could afford the basis of a claim by him for adverse possession of the property against the idol."⁵

But it may be pointed out that the aforesaid principle as laid down by the Supreme Court as ascribed to the observations of Rankin, C.J. had been laid down long before by the Judicial Committee in Jugget Mohini Dossee v. Sokheemoney Dossee⁶ which was concerned with a breach of trust. The Privy Council upheld the claim of the appellants that the lands in question were debutter in spite of the fact that those lands were being possessed adversely by the defendants who claimed that they were the title holders of the land as bona fide purchasers of value!

Simulated dedications happen often enough, but we come to know only about those cases which are challenged in the Courts. It is suggested that in every state where private religious endowments are common e.g. West Bengal, a Government department should be set up to keep a record of all private

1. Ram Ratan v. Kashinath AIR 1966 Pat 235.

2. AIR 1954 SC 69.

3. Ibid., p. 71.

4. AIR 1933 Cal 295.

5. AIR 1954 SC 69, 73.

6. (1871-72) 14 M I A 289.

religious endowments and to investigate the way all those endowments are used. The listing of Muslim endowments (wakf) including private wakfs in South Asian countries under Wakf Acts shows that this is at least theoretically possible.

b. Absolute and Partial Debutter

A dedication may be either absolute or partial. In a dedication where a donor divests himself of all the beneficial interests of the property in favour of an idol and the idol takes that property as an owner, the property comprised in the dedication is regarded as the absolute debutter property of the idol or the deity. In such a case a settlor gives his property out and out to the deity,¹ but the property will be regarded as a partial debutter when he dedicates his lesser interest² in the property to the deity. In the former case, "the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person",³ but in the latter case, the property is still a secular property⁴ with the incidence of heritability, alienability and partibility,⁵ subject only to a charge⁶ for expenses of performing religious ceremonies, worship of the deity, etc.

There is yet a third phenomenon, namely where lands free of land revenue are transferred to the priests provided they render service to the deity.⁷

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1. Iswari Bhubaneswari v. Brojo Nath AIR 1937 PC 185. The main question of the case was the efficacy of an instrument of dedication.
 2. N.R. Raghavachariar, Hindu Law, Vol. 1, M.L.J. Madras, 1980, 629.
 3. Per Sir George Rankin, Hemanta Kumari v. Gauri Shankar, AIR 1941 PC 38, 42. For facts and principles see below, this section.
 4. S.S. Pillai v K.S. Pillai, AIR 1972 SC 2069.
 5. Benigopal v. S. Gangadhar, AIR 1949 Ajmer 23; Phani Bhusan v. Kenaram Bhuniya AIR 1980 Cal 255.
 6. Balaram Rai v. Ichha Patrani AIR 1950 Ori. 225; Jagannath Mahaprabhu v. Bhagaban Das AIR 1951 Ori, 255.
 7. For an illustration see Sri Vallabharaya v. Deevi Hanumanacharyulu AIR 1979 SC 1147.

This is a less interesting case and we need not pursue it. The policy whether such lands should remain entirely free of revenue is one for the state to decide.

In this connection, it should be noted that in the case of a partial dedication, it need not necessarily be a dedication of a limited interest in a property in favour of a deity. In Hemanta Kumari v. Gauri Shankar,¹ the controversy centred upon the claim of the plaintiff to the ownership of a bathing ghat on the banks of the Ganges at Benares.² Sir George Rankin who delivered the judgement of the Privy Council, observed that:

"A bathing ghat on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of Hindu law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a dharmashala or a math, notwithstanding that it be not dedicated to any particular deity ... Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object, but also, as Mr. Mayne in his well-known work was careful to notice, "where the owner retained the property himself but granted the community or part of the community an easement over it for certain specified purposes (Hindu Law and Usage, 6th edn., 1900, S.438, page 567)".³

In Chairman of Howrah Municipality v. Kshetra Krishna Mitra,⁴ the suit had been concerned with the title of a bathing ghat on the bank of the River Hooghly. Sir Asutosh Mookerjee, J.'s observation in that case as approved in Hemanta Kumari's⁵ case seems to be the established law on the subject. Sir Asutosh observed that

"An owner may appropriate land to public use and yet retain in himself all such rights in the soil as are compatible with full exercise and enjoyment of the public use to which the property has been devoted. It is not essential to constitute a valid dedication that the legal title should pass from the owner ... nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated."⁶

1. AIR 1941 PC 38.

2. The observation of Mulla in his Hindu Law, 14th ed.,^{Reprint,} 482, is not correct when he says that in Hemanta Kumari v. Gauri Shankar, "it was held that the plaintiff is the owner and that there was no dedication". For the ruling of the Court was that it was a case of partial dedication.

3. AIR 1941 PC 38, 41.

4. (1906) 4 CLJ 343.

5. AIR 1941 PC 38, 42.

6. (1906) 4 CLJ 343, 349.

Cases of dedication of the above type are not found often among Hindus. The mode of dedication through formality or legal instruments as found in dedications in favour of idols, does not seem to be followed by Hindus in cases of bathing ghat or burning ground. The latter is not so popular as the former. The reason might conceivably be that prudent Hindus may find that dedication in favour of bathing ghats or burning grounds are not such materially profitable investments as gifts in favour of idols.

Again, the character of a dedication as absolute, is not affected because of the fact that the dedication of the property is meant for carrying on worship of images later to be immersed in water after worship.¹ In Purna Chandra v. Kalipada Roy² the Calcutta High Court did not accept the argument of the counsel for appellants that the document in question did not create a valid or an absolute debutter because the property was not dedicated to a permanent image. It ruled that a permanent image of a deity was not necessary before a valid gift could be made under Hindu law.³

Moreover, the nature of a dedication, whether complete or partial, is not affected by the question whether an endowment is public or private. In other words, "the distinction between a complete or partial dedication of particular property operates equally with reference to public and private endowments, and must be established from a construction of the document of dedication read as a whole."⁴ The issues whether a dedication is absolute or partial or whether or not it is public or private are really two separate issues and they should not be confused.⁵

Now, in Maharaja Jagadindra v. Rani Hemanta Kumari,⁶ though the main question to be determined was whether the right to sue in ejectment which

1. Bhupati v. Ram Lal (1909-10) 14 CWN 18 (FB) = ILR (1910) 37 Cal 128 (FB); Asita Mohan v. Nirode Mohan AIR 1917 Cal 292; Purna Chandra v. Kalipada Roy AIR 1942 Cal 386; Brojobala v. Sri Saradiya Durgamata, AIR 1953 Cal 285.

2. AIR 1942 Cal 386.

3. Ibid., p. 387.

4. Derrett, IMHL, 509; Dasaratharami Reddy v. Subba Rao, AIR 1957 SC 797.

5. R. Dhavan, "The Supreme Court and the Hindu Religious Endowments" (1978) 20 JILI, 52-102, 76.

6. (1903-04) 31 IA 203.

accrued to the plaintiff as shebait during his minority and suits as were brought within three years of the majority were barred by limitation under Sec. 7 of the Limitation Act (Act 15 of 1877), the Privy Council pronounced on the character of both absolute or complete and partial, or less complete, debutter property. Sir Arthur Wilson who delivered the judgement of the Judicial Committee, observed that:

"There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest character. The cases of Sonatun Bysack v. Sreemutty Juggutsoondaree Dossee¹ and Ashutosh Dutt v. Doorga Churn Chatterjee² are instances of less complete dedications, in which, notwithstanding a religious dedication, property descends (and descends beneficially)³ to heirs, subject to a trust or charge for the purposes of religion."

In Sonatun Bysack v. Sreemutty Juggutsoondaree Dossee,⁴ one Ramdoss Bysack of Dacca made a will leaving all his self-acquired movable and immovable property in favour of the family idol. In that case, one of the points to be considered by the Judicial Committee was whether the idol to whom the property was dedicated was intended to take it absolutely. In construction of the will the Judicial Committee came to the conclusion that the settlor did not intend to give his property absolutely to the deity. Lord Justice Turner who delivered the judgement for the Privy Council, held that

"he did not intend to give this property to the idol seems to their Lordships to be clear from the directions which are contained in the third clause, that after the expenses of the idol are paid, the surplus shall be accumulated; and still more so from the fifth clause, by which the testator has provided from whatever surplus should remain out of the interest of the property, the expenses of the idol being first deducted. It is plain that the testator, looking at the expenses of the idol, was not contemplating an absolute and entire gift in favour of the idol."⁵

It is obvious from Hindu practice in some quarters a century or so ago

1. (1859-61) 8 MIA 66.

2. (1879) 6 IA 182.

3. (1903-4) 31 IA 203, 209.

4. (1859-61) 8 MIA 66.

5. Ibid., pp. 85-86.

that the idea of relatives retaining beneficially the remainder of an income when the deity's worship had been performed was familiar and acceptable, though the possibility of income tax being levied on that remainder had not yet arisen.

In Ashutosh v. Doorga Churn,¹ the respondents as shebait of a family idol, instituted the suit to prevent an order for execution of a money decree against Durga Churn which was carried out because of his sale of his interest in a certain property which was alleged to be debutter property. The main question of the case was whether the interest in the property in question was liable to be attached and sold in execution of the said decree. The Judicial Committee answered the question in the affirmative on the basis of some terms in the will of the testator. The will contained a clause saying that "after all these acts have been observed from the proceeds of the said property, if there be a surplus in the profits then the family will be supported therefrom."² Sir Barnes Peacock who delivered the judgement of the Judicial Committee held that:

"Their Lordships, not without some doubt and hesitation, have come to the conclusion that these words amount to a bequest of the surplus to the members of the joint family for their own use and benefit... In these circumstances, their Lordships are of opinion that the attachment should be allowed to stand."³

The significance of this for our study is obvious. The principles as enunciated in those two cases have never been questioned in any Court; they have been discussed and applied in different cases in the Privy Council, the Supreme Court and the High Courts in India. Thus in Jadunath Singh v. Thakur Sitaramji⁴ though the main issue to be decided was related to the construction of the will, the Judicial Committee discussed both Sonatun Bysack's⁵ and Ashutosh Dutt's case.⁶ Thus, Viscount Haldane observed that:

1. (1879) 6 IA 182.

2. (1879) 6 MIA 182, 186.

3. Ibid., p. 188.

4. AIR 1917 PC 177.

5. (1859-61) 8 MIA 66.

6. (1879) 6 IA 182.

"On looking at those cases, the first was a case in which Sir George Turner held that, although nominally there was a gift at the beginning to the idol, that gift was so cut down by subsequent disposition as to leave it clear that the subsequent disposition ought to prevail rather than the earlier one, and that consequently there was no gift to the idol such as to make the property pass an absolute and entire interest in its favour. The second case is also a decision of this Board, and came to very much the same thing. It was a question of the construction of a will, taken as a whole, and it was said there was not a complete gift to the idol; it was cut down by the subsequent disposition to the family. Here there is no such cutting down."¹

Therefore, it was held in that case that there was a clear intention of the settlor to dedicate "the whole estate for the benefit of the idol and the temple, and then the rest is only a gift to the idol sub modo by a direction that of the whole, which had already been given part is to be applied for the upkeep of the idol itself and the repair of the temple, and the other is to go for the upkeep of the managers."²

In order to find out whether a property is partial or complete debutter, the Courts have to find out the intention of the settlor, as expressed in the terms of the instrument of dedication.³ In Gopal Lal v. Purna Chandra⁴ there was a direction in the will that the grandson of the testatrix should perform the worship of the family idols out of the income of a specific property. The Judicial Committee found that "the will is most obscure, but their Lordships think that there is certainly no direct gift of the whole property...."⁵ As a result, they had to rule that the will created only a partial debutter. Thus, in Ananda Charan v. Kamala Sundari,⁶ the High Court of Calcutta held the dedication in the property as not complete, on the basis of a clear provision in the will that the surplus profits would be shared by the testator's wife and son.

1. AIR 1917 PC 177, 179.

2. Ibid.

3. A settlor's intention to dedicate the property absolutely may be inferred if he or she puts a self-imposed ban under a settlement deed on alienation of the deed property. The reservation of certain rights during his or her lifetime over the property will not change the character of the property from the absolute to the partial. See Kothandaraja Pillai v. Swamy Viswa Vinayakar (1981) 1 MLJ 344, an interesting case where a widow dedicated her property in a settlement but reserved certain rights of enjoyment for herself during her lifetime.

4. AIR 1922 PC 253. 5. Fer Lord Buckmaster, ibid., p.254. 6. AIR 1936 Cal. 405.

Now so far as a particular document of dedication is concerned, the cardinal point to be remembered is that in deciding the nature of a dedication, whether complete or partial, the Court should not be influenced by the use of particular words in the will. This question is to be determined in each case, taking into consideration the material terms used in the document. In short, to ascertain the intention of the settlor and to decide the nature of the dedication, whether partial or absolute, the document, as a whole, has to be considered.¹

In Har Narayan v. Surja Kunwari,² the will of the testator provided that the property in the will should be taken as the property of the idol and in addition to that, there was a provision that after meeting the expenses of the temple, the residue should be used by legal heirs to meet their own expenses. In that case, the Privy Council had to settle a dispute between the heirs and the shebait. The main issue to be decided was related to the construction of the will, which purported to give the whole property to the family idol called Sri Thakurji. Lord Shaw who delivered the judgement of the Privy Council, ruled that:

"In such cases, no fixed and absolute rule can be set up, derived alone from the use of particular terms in one portion of the will. The question, whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relations of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol, is a question which, can only be settled by a conspectus of the entire provisions of the will."³

The principles as propounded in that case, have been accepted by the Courts as the guidelines in dealing with the cases where the issues are related to the construction of wills.

In Iswari Bhubaneshwari v. Brojo Nath,⁴ the Judicial Committee applied

1. Har Narayan v. Surja Kunwari, AIR 1921 PC 20; Sree Sree Ishwar Sridhar v. Sushia Bala, AIR 1954 SC 69; M. Dasaratharami Reddi v. D. Subba Rao AIR 1957 SC 797; Nirmala Bala v. Balai Chand, AIR 1965 SC 1874; S.S. Pillai v. K.S. Pillai, AIR 1972 SC 2069; C.I.T., W.B. v. Jagannath Jew AIR 1977 SC 1523; Durai Kanu v. Natesa Pillai (1978) 1 MLJ 296.

2. AIR 1921 PC 20.

3. Ibid., p.20.

4. AIR 1937 PC 185.

the decision in Har Narayan's case¹ to settle the issue whether under the deed of settlement there was an absolute dedication to the deity. The Privy Council concurred with the decision of the High Court and quoted from the judgement of the High Court that "there is a charge for the upkeep, worship and expenses of the idol, and that the idol cannot claim to have an absolute interest in any portion of the property...."²

In Sree Sreee Ishwar Shridhar Jew v. Sunshila Bala,³ the will provided that the shebait could use the premises dedicated to the idol as residence for the purposes of worship and the holding of festivals. That provision itself could not move the Supreme Court from ruling that the dedication of the property in the will was of an absolute character. The rules as laid down in Har Narayan's case⁴ were applied and Bhagabati, J. who delivered the judgement of the Court, held that "It is quite true that a dedication may be either absolute or partial. The property may be either absolute or partial. The property may be given out and out to the idol, or it may be subjected to a charge in favour of the idol. "The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs... is a question which can only be settled, by a conspectus of the entire provisions of the will":- 'Har Narayan v. Surja Kunwari' AIR 1921 PC 20..."⁵

In M. Dasaratharami Reddi v. D. Subba Rao,⁶ where Har Narayan's case⁷ was referred to, the main issue was whether the properties in the suit are merely charged in favour of particular charities. Gajendragadkar, J. who delivered the judgement of the Supreme Court, held that "whether or not dedication is complete would naturally be a question of fact to be

1. AIR 1921 PC 20.

2. AIR 1937 PC 185, 188.

3. AIR 1954 SC 69.

4. AIR 1921 PC 20.

5. AIR 1954 SC 69, 72.

6. AIR 1957 SC 797.

7. AIR 1921 PC 20.

determined in each case in the light of the material terms used in the document. In such cases, it is always a matter of ascertaining the true intention of the parties; it is obvious that such intention must be gathered on a fair and reasonable construction of the document as a whole."¹

Har Narayan's case² was not referred to but its principles have been followed in Ram Kishorelal v. Kamal Narayan.³ In that case, the main issue to be decided was whether a dedication of a village to a temple by an instrument of dedication was made absolutely or not. The Supreme Court, to determine the character of the dedication, construed the document of dedication and strangely, without following or mentioning the leading case of Har Narayan⁴ on the subject, followed a case⁵ which did not have any connection with Hindu religious endowments and held that:

"The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention, the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used."⁶

The decision in the aforesaid case was applied by the Calcutta High Court in Pran Krishna v. Controller of Estate Duty,⁷ and was referred to in S.M. Mohideen v. R.V.S. Pillai⁸ where the Supreme Court had to determine the character of an endowment as made to the temple in question. In the latter case, Goswami, J. pronounced for the Supreme Court that "Whether the endowment is absolute or partial, primarily depends on the terms of the grant. If there is an express endowment, there is no difficulty. If there is only an implied endowment, the intention has to be gathered on the construction of the document as a whole. If the words of the document are clear and unambiguous

1. AIR 1957 SC 797, 800.

2. AIR 1921 PC 20.

3. AIR 1963 SC 890.

4. AIR 1921 PC 20.

5. Md. Kamgarh Shah v. Jagdish Chandra, AIR 1960 SC 953. The subject-matter of the case was related to the mining rights as implied in the terms of a certain lease.

6. Per Das Gupta, J., Ibid., p. 894.

7. AIR 1968 Cal. 496, Supra p.151.

8. AIR 1974 SC 740.

the question of interpretation would not arise. If there be ambiguity, the intention of the founders has to be carefully gathered from the scheme and the language of the grant. Even surrounding circumstances, subsequent dealing with the property, the conduct of the parties to the document and long usage of the property and other relevant factors may have to be considered in an appropriate case."¹

In Nirmala Bala v. Balai Chand,² the plaintiff contended that the deed of dedication did not give the interest in the properties in the suit to the idols absolutely. It was held by the Supreme Court that the question whether a deed of dedication was of an absolute character or not must be settled by a conspectus of all the provisions of the will. The principles in Har Narayan's case were applied in that case.

In S.S. Pillai v. K.S. Pillai,³ as the High Court was unable to give its firm verdict on the controversy between the parties centering on the issue whether the dedication made under exhibit "A.2" was partial or complete, the Supreme Court followed Dasaratharami Reddi v. Subba Rao,⁴ and came to the now platitudinous conclusion by ruling that:

"dedication of a property to religious or charitable purposes may be either complete or partial. If the dedication is complete, a trust in favour of a public charity is created. If the dedication is partial, a trust in favour of a charity is not created but a charge in favour of the charity is attached to and follows the property which retains its original and secular character. Whether or not a dedication is complete would naturally be a question of fact to be determined in each case on the terms of the relevant document if the dedication in question was made under a document. In such a case, it is always a matter of ascertaining the true intention of the parties; it is obvious that such an intention must be gathered on a fair and reasonable construction of the document considered as a whole."⁵

In C.I.T., W.B. v. Jagannath Jew,⁶ one Raja Rajendra Mullick having enormous estates, dedicated certain properties to the family idol called Sri Jagannathji. The subject-matter of the case was the taxability of the deity.

1. Ibid., p. 748.

2. AIR 1965 SC 1874.

3. AIR 1972 SC 2069.

4. AIR 1957 SC 797.

5. Per Hegde, J., AIR 1972 SC 2069, 2076.

6. AIR 1977 SC 1523.

The Supreme Court had to go through the instrument of dedication in order to find out the intention of the donor and to adjudge the issue whether the settlor intended to dedicate his properties absolutely in favour of the said idol. The principles as formulated in Har Narayan's case¹ were again applied. K. Iyer, J. who delivered the judgement, opined that:

"If on a consideration of the totality of terms, on sifting the more essential from less purposes, on sounding the depth of the donor's wishes to find whether his family or his deity were the primary beneficiaries, and on taking note of the language used, if the vesting is in the idol an absolute debutter can be spelt out. So considered, if the grant is to the heirs with a charge on the income for the performance of pujas, the opposite inference is inevitable."²

But Jadu Gopal v. Pannalal³ (not many months later) seems to fail to apply the principles as formulated in the above cases and the issue was the interpretation of the terms of a will, for finding out the intention of a donor, to settle the question whether a particular dedication was of an absolute character or not. In this case, the Supreme Court in coming to the conclusion that the property in the "Deed of Trust" was not absolute debutter, gave paramount importance to the clauses 4 and 15 of the deed of dedication. The said two clauses are reproduced below for our reference.

"4. I shall remain as the sole trustee and shebait of these properties and debutter mentioned above so long as I shall remain alive, and shall be able to sell or settle temporarily or permanently or be able to distribute to the tenants the Trust property or any part thereof. No trustee excepting me shall be able to encumber the Trust and debutter property or the part thereof excepting letting the property or any part thereof not more than three years. No trustee of debutter shall be able to encumber the property in any manner of transfer or shall not be able to do any thing which shall in any way diminish the value or glory of the deity or do anything which should decrease the income or loss of the debutter property."⁴

"15. That I shall be able to change the terms of this deed but no other trustee excepting myself shall be able to change the terms and conditions of the deed."⁵

1. AIR 1921 PC 20.

2. AIR 1977 SC 1523, 1534.

3. AIR 1978 SC 1329.

4. Ibid., p. 1330.

5. Ibid., p. 1331.

But the Court has failed to give importance to the terms of two other clauses, namely 1 and 2, which should have convinced it to give its verdict the other way round. The said two clauses run thus:

- "1. All that properties in Schedule is vested in to the Debutter and Trust Property completely and permanently from today.
- "2. That from the income of the above-mentioned property according to the account and estimate mentioned in Schedule (Kha) the expenditure of Durga puja, Kali puja, and Saraswati puja will be made permanently and these properties are hereby encumbered permanently for the purpose of meeting these expenditures, and under these circumstances, all these properties completely and with all the rights I dedicate to the deity Lakshmi Janardan."¹

In the present case, the Supreme Court has applied the principles laid down in Iswari Bhubaneswari Thakurani v. Brojo Nath,² and held that the deed of dedication "prescribed no destination of the growing income which will become surplus after meeting the expenses prescribed by the settlor for the worship of the deities, the performance of the specified religious festivals and the building of the Thakurbari temple."³ But it has been admitted by the Court that the facts of the present case and those of Iswari Bhubaneswari's case⁴ are not the same, when it observes that "the instant case is not on all fours with the above cited case".⁵ This is why the principles in Iswari Bhubaneswari's case⁶ should not have applied in the present case. The facts of Iswari Bhubaneswari's case⁷ revealed that the testators had prescribed the destination of possible growing income when it was said in the instrument of dedication that:

"The shebaitis are directed 'to build with the said money additional masonry building, house, etc. on the debuttar Lands and give them for the convenience of residence and habitation of our heirs. If in the course of time the number of heirs becomes large, the nearer heirs shall reside in this house as far as practicable'."⁸

1. AIR 1978 SC 1329, 1330.

2. AIR 1937 PC 185.

3. AIR 1978 SC 1329, 1339.

4. AIR 1937 PC 185.

5. AIR 1978 SC 1329, 1339.

6. AIR 1937 PC 185.

7. Ibid.

8. Ibid., p. 187.

These words point to the fact that the grantors did not want to give the properties in the deed out and out to the idol. They were more concerned with the welfare and interest of their heirs. But nowhere in the present case can we find that the testator intended to give the property to the idol subject to a charge only. It might be true that the settlor was aware of the fact that in future the income of the property would grow and exceed the expenditure prescribed for religious ceremonies. But absence of direction regarding what to do with the surplus income, does not in any way suggest that the said income could be treated as income of a secular property. In Dasaratharmi Reddy v. Subba Rao,¹ it was held that "If the income of the property is substantially intended to be used for the purpose of the charity ... it may be possible to take the view that dedication is complete."² This rule could well be applied in the present case where the whole interest in the properties in the deed was intended for religious purposes, but unfortunately, the Supreme Court failed to do so.

In the present case, the Supreme Court observed that:

"here, the Deed of Trust (Ex 1) prescribes no destination of the growing income which will become surplus after meeting the expenses prescribed by the Settlor for the worship of the deities, the performance of the specified religious festivals and the building of the Thakurbari temple.

Read in the light of the principles enunciated above, the Deed of Trust, Ex. 1, was capable of two possible constructions:

- (i) It created only a partial dedication and not an absolute debutter, the properties being charged for seva puja or other religious purposes to the extent specified therein.
- (ii) It created an absolute debutter in favour of the deity. The former construction was expressly adopted in the previous suit by the trial Court..."³

Then the Court jumped to the conclusion that the property in the suit was partial debutter. In Iswari Bhubaneswari's case,⁴ the ruling was made only after a careful examination of all the terms of the will. The Judicial Committee held that: "The purposes of the dedication may be directed

1. AIR 1957 SC 797.

2. Per Gajendragadkar, J., Ibid., p. 800. The same view was held by the Supreme Court in S.S. Pillai v. K.S. Pillai, AIR 1972 SC 2069.

3. AIR 1978 SC 1329, 1339.

4. AIR 1937 PC 185.

to expand as the income increases or the purposes may be prescribed in limiting terms so that if the income increases beyond what is required for the fulfilment of these purposes, it may not be protected by the dedication,"¹ only when they "have read the deed of dedication with [certain] considerations in mind and they have been much assisted by the careful analysis to which its provisions have been subjected by the learned Chief Justice... But different considerations apply with regard to the remaining properties comprised in the deed of dedication and deed of sale. In the first place, throughout the deed of dedication the observances prescribed are repeatedly referred to as those originally in use to be performed and their Lordships agree with the learned Chief Justice that on a fair reading of the deed as a whole, it was not intended that the ceremonies and expenditure should increase indefinitely with the growing income yielded by the properties."²

Thus the circumstances of Bhubaneswari's case³ are in no way comparable to those in the present case. In this case, apart from the fear of the settlor that the properties in the deed might be misappropriated as secular properties by his heirs, no other interpretation could be attached to the terms of the will. The fact that it was in the clause that he could be the only person to change the terms of the deed, simply indicates that he had a fear that his heirs might use the deities' properties as secular ones.

Again, the Supreme Court, in support of its ruling that when the dedicated property being large leaves surplus after meeting the religious expenses some portion could be construed as undisposed vesting in heirs of the settlor as secular property, has cited the view as expressed in B.K. Mukherjea's book - The Hindu Law of Religious and Charitable Trusts.⁴ But it missed the other view as cited by the same author in the same book that:

1. Per Lord Macmillan, ibid., p. 188.

2. Per Lord Macmillan, ibid., p. 188 ; Surendroakeshub v. Doorgasundari (1892) 19 IA 108, was referred to.

3. AIR 1937 PC. 185.

4. 1st ed., Eastern Law House, Calcutta, 1952, pp. 176-177.

"A mere direction to accumulate the surplus income of the debutter estate for the purpose of augmenting the corpus would not make the dedication partial if the entire interest is given for religious purposes and no portion of the income is meant for the heirs."¹

This rather (it is submitted) obvious rule, as laid down in Sarojini v. Gnanendra,² as cited by Mukherjea could have been applied appropriately to the facts of the present case.

In Sarojini v. Gnanendra,³ the settlor, Srinath Das, intended to dedicate most of his properties to the family idols. There was a direction in the will that after meeting expenses, the residue money should accumulate as debutter fund. The plaintiff's case was that the said expenses might form only a charge on the properties in favour of the idols and there would be intestacy as to any money surplus over the expenditure. In his judgement, Sanderson, C.J. observed that:

"The clause relating to accumulation is merely incidental to the provisions relating to the dedication and management of the property, and in any judgment the intention of the testator can clearly be gathered from the terms of the clause, viz. that a power, and it may be said a necessary and reasonable power, is given to the shebait from time to time in the course of the management of the properties to make safe investment of the surplus income and thus increase the debutter fund, and a direction is necessarily implied that the income not required for the specified expenses, shall be used within a reasonable time and in a reasonable way for other religious ceremonies and other charitable work. It is left to the discretion of the shebait to decide the exact form and the exact time when the income should be so used."⁴

In the present case, in so far as the law is concerned, the application of the rule as cited above would have been the most appropriate one. In the same case, Sir Asutosh Mookerjee, J. held that:

"It is well-settled that 'where there is an unconditional gift to charity, a direction for accumulation is invalid, but the only result is that the income is immediately distributable in charity; the heirs or next of kin are not let in.'"⁵

In direct contravention of the rule as cited and underlined in the present

1. Ibid., p. 181.

2. (1916) 23 CLJ 241.

3. (1916) 23 CLJ 241.

4. Ibid., pp.250-251. My emphasis.

5. Ibid., p. 254. My emphasis.

case, the Supreme Court has made the law allowing the heirs to inherit the properties which should have been absolutely owned by the deity. Though Har Narayan's case¹ was referred to in the case, its spirit has not been accepted by the Court. In the present case, Iswari Bhubaneswari's case² has been misapplied, and to Har Narayan's case³ lip service has been given by the Supreme Court. Har Narayan itself could have guided the Court if it had been ready to find out the inner meaning of what the Privy Council had ruled in that case on the question of the construction of a will taken as a whole.

But Jadu Gopal⁴ also has its merits. It has shown us that the highest Court taking into consideration the present needs of the country can, if it intends, sidestep the precedents. The Supreme Court could have ruled the suit properties as absolute debutter but instead it has held them as partial debutter, thus it has ruled in such a way as to release the properties from the bondage of perpetuity. The decision has its novelty in the sense that without adhering strictly to the law on the subject it has hinted that social and economic needs of the country come first. In so far as Hindu law is concerned Jadu Gopal⁵ seems to be a step towards judicial reform of the law.

In my opinion, in construction of wills, the Courts should indeed incline against holding endowed properties as absolute debutter as opposed to partial debutter. Jadu Gopal⁶ has shown us a new direction and the High Courts can rely on its authority. With its vast population India can no longer afford to allow areas of the land mass to be locked as debutter (free from rules against perpetuity). The social needs of the nation are to be given urgent consideration. Lands are needed to fulfil social purposes. Even where, as is usually the case, laws exist for the compulsory acquisition of lands for

1. AIR 1921 PC 20.

2. AIR 1937 PC 185.

3. AIR 1921 PC 20.

4. AIR 1978 SC 1329.

5. Ibid.

6. Ibid.

public purposes (debutter is not exempt)¹ the compensation arising could be similarly locked up. It is also suggested that whenever there is no proper direction in a private religious endowment for the destination of a surplus amount, income tax must be applied without deduction on that amount.

A tendency to lean towards construing a grant as 'partial debutter' where possible can be discerned, as in Phanibhusan v. Kenaram.² Where only part of the income is in fact spent on worship the court may hold that the debutter was partial with two important effects: (i) all the remainder is subject to the revenue laws as property of individuals, and (ii) the shebait may alienate subject to a mere charge for purposes of worship, which greatly facilitates the transfer of property.

c. Private and public debutter

In so far as Hindu law is concerned, a distinction exists between private and public debutter.³ But this distinction is of comparatively recent origin. Thus in Monohar v. Bhupendra Nath⁴ Mukerji, J. observed that "the distinction between public and private debutter is a thing of comparatively modern growth."⁵ The distinction cannot be traced in ancient texts on Hindu law.⁶ Moreover, in modern Hindu law in any endowment whether it is private or public debutter, the ownership of the property and its income vest in the deity who "represents always a public purpose par excellence and the epitome thereof."⁷ In both kinds of endowment the

1. See K.W. Estate v. State of Madras AIR 1971 SC 161, 164; Narendra Frasadji v. State of Gujarat AIR 1974 SC 2098, 2103; Mahant Ram Kishan Dass v. State of Punjab AIR 1981 SC 1576, 1576-1577.

2. AIR 1980 Cal 555.

3. N.R. Raghavachariar, op.cit., vol. 1, 7th ed., 625; B.K. Mukherjea, op.cit., 4th ed., 184.

4. AIR 1932 Cal 791 (FB).

5. Per Mukerji, J., Ibid., p. 806. See also on this point Rupa Jagshet v. Krishnaji Govind ILR (1884) 9 Bom 169, 171.

6. V.K. Varadachari, op.cit., 2nd ed., 19-20.

7. I-T Commr. v. Jogendra Nath, AIR 1965 Cal 570, 582.

rights and liabilities of the deity are always the same.¹

In this context it may be pointed out again² that unlike English law a religious trust in Hindu law may be of a private character, benefit of which is confined to a particular family. In Radhakanta Deb v. Commr., Hindu Religious Endowments, Orissa,³ where the main point for determination was whether or not the temple in question was a private one, Fazal Ali, J. referring to B.K. Mukherjea and his book, The Hindu Law of Religious and Charitable Trusts (1952 ed.) observed for the Supreme Court that "The learned author has ... pointed out that one fundamental distinction between English and Indian law⁴ lies in the fact that there can be religious trust of a private character under Hindu law which is not possible in English law. It is well settled that under Hindu law, however, it is not only permissible but also very common to have private endowments...."⁵

Now, there is no hard and fast rule which will determine whether a particular debutter is private or public; in each case it is a question of fact.⁶ Sometimes the issue involves investigation of complicated facts⁷ and it must be solved on the consideration of all circumstances and all the evidence produced in a particular case.⁸ "The question as to whether the religious endowment is of a private nature or of a public nature has to be decided with reference to the facts proved in each case and it is difficult to lay down any test or tests which may be of universal

1. Srinivasan, op.cit., 4th ed., Vol. 3, 2555.

2. The question has been discussed in sec. 2 of the 2nd chapter.

3. AIR 1981 SC 798.

4. With due respect it may be pointed out that the starting sentence in the paragraph (para 6, 799), AIR 1981 SC 798, that "the concept of a private endowment or a private trust is unknown to English law where all trusts are public trusts of a purely charitable and religious nature" is very confusing and not true. The observation of his Lordship is a slip of the pen.

5. Ibid., p.799. On this point see also Shri Govindlalji v. State of Rajasthan AIR 1963 SC 1638, 1648.

6. S.V. Gupte, Hindu Law in British India, 2nd ed., N.M.Tripathi, Bombay, 1947, 842.

7. Moti Das v. S.P.Shahi AIR 1959 SC 942, 951.

8. Sarjoo v. Ayodhya Prasad AIR 1979 A.1. 74, 79.

application."¹

In a public debutter the dedication is for the use or the benefit of the public at large² or a section thereof. But a private religious endowment is meant for the private use of a founder and his family although members of the community may be admitted into the temple for worship or for making offerings.³ The distinction is of the greatest significance.

In Deoki Nandan v. Murlidhar⁴ where the only issue to be decided by the Supreme Court was whether or not the temple of Sri Radhakrishnaji was a private or a public one, Venkataswami Ayyar, J. pronounced that "the distinction between a private and public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof, while in the former, the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment."⁵ The same view was expressed in different language in Ram Saroop Dasji v. S.P. Shahi⁶ and State of Bihar v. Sm. Charusila Dasi⁷ in which the Supreme Court relied on Deoki Nandan's case.⁸

In Deoki Nandan's case⁹ it was held that in the determination of the character of a temple whether it was private or public "The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general

1. Per Fazal Ali, J. Radha Kanta Deb v. Commr., Hindu Religious Endowments, Orissa, AIR 1981 SC 798, 800. On this point see also Dhaneswarbuwa v. Charity Commr. Bombay, AIR 1976 SC 871, 877. Infra p.186.

2. Profulla Chorone v. Satya Choron AIR 1979 SC 1682, 1687. Infra p. 213.

3. Bhagwan Din v. Gir Har Saroop AIR 1940 FC 7, 11; Bihar State Board of Religious Trust v. Mahant Biseshwr Das AIR 1971 SC 2057, 2061; G.G. v. Narashima Prabhu v. Asst. Commr. H.R.C.E. AIR 1977 SC 1192, 1194; Radha Kanta Deb v. Commr., Hindu Religious Endowments, Orissa, AIR 1981 SC 798, 799.

4. AIR 1957 SC 133. Supra p.140.

5. AIR 1957 SC 133, 136. On this point see also B.B.H.R. Trusts v. Madan Lal AIR 1977 Pat 23, 25.

6. AIR 1959 SC 951, 956.

7. AIR 1959 SC 1002, 1008.

8. AIR 1957 SC 133.

9. Ibid.

public or any specified portion thereof."¹ This statement has been quoted, with approval, with emphasis supplied by the Supreme Court in Radhakanta's case.²

Again, the mere fact of the use of a temple by the public cannot mean that the temple is dedicated to the public.³ But if the use of the temple by the public is made not as a matter of concession but as a matter of right, then such a public user will be reckoned as good evidence of dedication for the benefit of the public.⁴ It is on this factor of public user, that sec. 20 of the Madras Hindu Religious and Charitable Acts, 1959, has given stress in defining a temple.⁵

In this context it may be pointed out that the benefit of a private endowment is not necessarily limited to a single family. Individual members of different families may choose to make a valid private endowment. In Sarjoo Prasad v. Ayodhya Prasad,⁶ the temple in question was founded by a group of pandas for their families and successors. The High Court of Allahabad ruled that "It is possible for a few persons drawn from different families of pandas inter-related to each other, as in the present case, to get together and choose to make a private endowment."⁷ A temple is after all an income-producing agency, since strangers may make gifts to the idol.

Again a temple which was originally founded as a private one might become public in course of time.⁸ In Lakshmana v. Subramania⁹ the temple in

1. Ibid., p. 137.

2. AIR 1981 SC 798, 800.

3. Ibid.; Bhagwan v. Har Saroop AIR 1940 PC 7, 11; Bihar State Board of Religious Trust v. Bisheswar Das AIR 1971 SC 2057, 2061; G.G.V. Narashima Prabhu v. Asst. Commr., H.R. & C.E. AIR 1977 1192, 1194.

4. Narayan v. Gopal AIR 1960 SC 100, 110; G.S. Mahalaxmi v. Shah Ranchhodas AIR 1970 SC 2025, 2031; Dhaneshwar buwa v. Charity Commr. State of Bombay AIR 1976 SC 871, 878; Radhakanea Deb v. Commr. Hindu Religious Endowments, Orissa AIR 1981 SC 798, 800. The same view was also expressed in the Report of the Hindu Religious Endowments Commission (1960-62), Govt. of India, Delhi, 1962, 32.

5. See below, sec. 4 of this chapter.

6. AIR 1979 All 74.

7. Fer Shukla, J. Ibid., p. 78.

8. G.S. Mahalaxmi v. Shah Ranchhoddas AIR 1970 SC 2025, 2031.

9. AIR 1924 PC 44.

question was initially founded as a private temple¹ but the founder "allowed Brahmins and other Hindus of various castes to worship the idol as if it was a public idol."² But though the character of a temple may change from private to public, the reverse does not seem to be true.³ Moreover, "If a temple is proved to have originated as a public temple, nothing more is necessary to be proved to show that it is a public temple."⁴ But if the temple is shown, with strong evidence, to originate as a private one, the court is reluctant to hold the temple as a public one, only on the basis of the admission of the public later on. In Mundacheri v. Achutan⁵ where the question for determination was whether or not the devaswom and its endowments in question were private, Sir John Willis observed for the Judicial Committee that "Had there been any sufficient reason for holding that these temples and their endowment were originally dedicated for the tarwad, and so were private trusts, their Lordships would have been slow to hold that the admission of the public in later times possibly owing to altered conditions, would affect the private character of the trusts."⁶

In Dhameshwarbuwa v. Charity Commissioner Bombay,⁷ an old document (sanad) which was produced and accepted by the Court, showed that the endowed land was the grant of "the British Government during the reign of Queen Victoria

1. G.S. Mahalaxmi v. Shah Ranchhoddas AIR 1970 SC 2025, 2031.
2. Per Sir John Edge, Laksmana v. Subramania AIR 1924 PC 44, 46.
3. The statement in B.K. Mukherjea's book, 4th ed., 187, that "once an absolute dedication was made in favour of a public temple ... the former owners of the property lose all their legal rights to go beyond the dedication" refers to Ramkishorelal v. Kamalnarayan, AIR 1963 SC 890, for its authority but the Supreme Court did not rule at all on the private/public issue. In fact the Court ruled that once a dedication was absolute it could not be changed into a partial one. See p. 897. Moreover, the main issue of the case was the nature of dedication whether it was absolute or partial but not the character of the temple whether it was private or public. See p. 892.
4. Per Hegde, J. on G.S. Mahalaxmi v. Shah Ranchhodas AIR 1970 SC 2025, 2031.
5. AIR 1934 PC 230.
6. AIR 1934 PC 230, 234.
7. AIR 1976 SC 871.

in favour of Devasthan Shri Vithal Rukhamai".¹ The question to be decided was whether the Sansthan was private or public. Goswami, J. summarising all the important principles as laid down by the Supreme Court over the years in different decisions, observed that

"when the origin of an endowment is obscure and no direct evidence is available, the Court will have to resolve the controversy about the character of the trust on documentary evidence, if any, the object and purpose for which the trust was created, the consistent manner in which the property has been dealt with or managed by those in charge, the manner in which the property has long been used by the public, the contribution of the public, to all intents and purposes, as a matter of right without the least interference or restriction from the temple authorities, to foster maintenance of the worship, the accretion to the trust proper by way of grants from the State or gifts from outsiders inconsistent with the private nature of the trust, the nature of devolution of the property are all important elements in determination of the question whether a property is a private or a public religious endowment."²

In my opinion this is the most comprehensive statement ever made in a decision covering the principles or tests for determination of the character of a temple whether it is private or public.

Now, we may revert to the point which was in effect laid down in Bhagwan Din v. Har Saroop³ that the mere fact of the use of a temple by the public will not characterise a particular temple as a public one. This particular factor was given much importance in G.G.V. Narashima Prabhu v. Asst. Commr., H.R. & C.E.⁴ The facts of the case revealed that though the trustees belonged to the particular section of the community (Goud Saraswat Brahmin community), members of the general Hindu community offered sevas and there was some income out of these sevas. Rejecting the verdict of the High Court that the temple in question was a public one, Gupta, J. pronounced for the Supreme Court that "The law is now well settled that 'the mere fact of the public having been freely admitted to the temple cannot mean that courts should

1. Ibid., p. 873.

2. AIR 1976 SC 871, 878.

3. AIR 1940 FC 7, 11.

4. AIR 1977 SC 1192 = (1977) 3 SCC 17.

readily infer therefrom dedications to the public...¹ (...Bihar State Board of Religious Trusts, Patna v. Mahant Sri Biseshwar Das, AIR 1971 SC 2057, at p. 2062)."² It may be pointed out that the temple to which members of the community at large contributed by way of sevas should not be designated by the Supreme Court as a private temple. Moreover, however small might be the amount of income of the temple out of those sevas, the very fact of earning income from sevas of the public, suggested that it was a public institution. It is of no use for the Court to fortify its judgement on the authority of previous decisions of the highest Court on other temples unless it goes deep into the circumstances of every case. One wonders whether the essential factor of burden of proof could have been influenced by the possible incidence of taxation? The Supreme Court is well known to lean in Hindu family matters against the Revenue.

It is submitted that as long as a private temple does not set up a business i.e. it is not founded only to earn income out of the offerings of the public in kind and money, it is in accordance with Hindu religious sentiments. No doubt the law does protect temples by enjoining competitors, on the analogy of infringement of trademarks, from diverting pilgrims who might make offerings,³ but that is incidental of the factum of public worship. Subject to this no one will deny that temples can be sources of profit to families who perform minimal services - indeed a very valuable source of transferable, heritable unearned income as was discovered in Badri Nath v. Mst. Punna,⁴ a case concerning baridars (proprietary managers

1. This observation of Shelat, J. in Bihar State Board of Religious Trusts v. Mahant Sri Biseshwar Das, AIR 1971 SC 2057, 2062 was based on the decision in Bhagwan Din v. Har Saroop, AIR 1940 PC 7 which was discussed by the Supreme Court at pp. 2061-62.

2. AIR 1977 SC 1192, 1194.

3. Patel Furshottamdas v. Bai Dahi ILR (1940) Bom 339.

4. AIR 1979 SC 1314.

→ In this case if it were a public trust the family could not be sure of even a fraction of the income for the future-- since the Court's jurisdiction in regard to public trusts could oust them altogether (see below, p.190).

- neither trustees nor shebait) in Kashmir. The objection against the present law is that it does not make any distinction between a Hindu private temple in which members of the public are admitted for worship which is established for the spiritual welfare of the founder and his family and a private temple which is functioning under the management of an individual or a family mainly to receive the income out of the offerings of the public who go there or are allowed to enter into it. This distinction has not yet surfaced in so many words in Indian law - yet from the point of view of the substance of the matter it is relevant, to say the least.

The law must emerge to the effect that the mere fact that members of the public enter a Hindu temple will not change the character of the temple from private to public but the fact of the public entering will characterise the temple as a public one if the temple is used by a family or other limited proprietors or impropiators in such a way as to earn income out of public offerings, and it is on the latter point that the ruling in Bhagwan Din's case¹ does not seem to be sound.² In that case, the temple was used by the members of the public and offerings were made by the community at large, so the temple should have been ruled as public. The case should not have been adjudged on the technical ground that the temple was established on a private land which was not an endowed property. To allow members of the public in a private Hindu temple is of course in accordance with Hindu sentiments as held in the Privy Council case³ but to allow them in a private temple for the purpose of earning money is not and cannot be in accordance with Hindu or any other religious sentiments and it is on this aspect that Bhagwan Din⁴ was wrong. Bhagwan Din⁵

1. AIR 1940 PC 7.

2. The Privy Council admitted (at p.10) that "it is certain that the temple and its Goshains profited from the increased resort to the temple during the mela".

3. AIR 1940 PC 7, 11 where Sir George Rankin observed that "it would not be consonant with Hindu sentiments or practice that worshippers should be turned away".

4. Ibid.

5. Ibid.

must not be taken as an authority in a future decision involving the private/public issue. In G.G.V. Narashima's case¹ the Supreme Court should not have accepted the principle laid down in the Privy Council case.

Yet we are in a dilemma. Without diminishing my submission that Bhagwan Din² was wrongly decided, I contend that the purpose of the Supreme Court is transparent. Once an apparently public temple is declared, virtually, the private enterprise of the shebait, under the income-tax law as it stands, the state will have some proportion (some considerable proportion) of the public's offerings in the shebait's hands. There are therefore two inconsistent tendencies at work in the Supreme Court simultaneously: (i) to protect Hindu families from taxation until the Revenue law discharged the appropriate burden of proof of incidence of tax and (ii) to free property from the dead hand and make it available to public uses by way of revenue. Irrespective of the technical questions arising out of conscious or unconscious breach with stare decisis, this dilemma, and this inconsistency call for resolution.

Section 4. THE PUBLIC TEMPLE AND ITS FUNCTIONS.

a. The Nature of a Public Temple

All this naturally brings us to the nature of that ambiguous entity, the public temple.

Section 6(20) of the Madras Hindu Religious and Charitable Endowments Act, 1959 (Act 22 of 1959), defines a temple as "a place by whatever designation known and used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof as a place of public religious worship...". The definition of a temple as given by the Madras Act is in effect a

1. AIR 1977 SC 1192.

2. AIR 1940 FC 7.

definition of a public temple. For, the phrase "public temple" refers to a place used as a place of religious worship by the community or a section thereof and dedicated to, or for the benefit of the community or a section thereof.¹ It is a sociological factor of some notoriety that temples are founded or developed to enhance the prestige or legitimate the claims of castes or communities or sections thereof. Moreover, sec. 6(5) of the Madras Act corroborates this view when it reads that "'Charitable endowment" means all property given or endowed for the benefit of, or as of right by the Hindu or the Jain community..." In the state of Madras the initial presumption is that a temple is a public temple.²

In T.V. Mahalinga Iyer v. The State of Madras,³ the question for determination was whether a temple in Madras was private or public. Krishna Iyer, J. pronounced for the Supreme Court that "It is undisputed law that so far as Tamil Nadu is concerned, there is an initial presumption that a temple is a public one."⁴ Unlike West Bengal, Bihar and U.P. there are very few cases of private debutter in Madras, but they are no by means unknown.⁵

All members of the Hindu public or any section thereof is entitled to enter into a public temple for offering their worship but it must be stressed that the position of the present law is that a temple will not be designated as a public one only because members of the public are admitted for offering their worship.⁶ If it would have been so, the test

1. Varadachari, op.cit., 2nd ed., 22.

2. Mundacheri Koman v. Achutan Nair (1933-34) 6IA 405=AIR 1934 FC 230; Lakshmana Goudan v. Subramania Ayyar AIR 1924 FC 44; Subramania v. Lakshmana AIR 1920 Mad 54 (FB).

3. (1981) 1 SCJ 208.

4. Ibid.

5. T. Mudaliar v. Commr. H.R. & C.E (1975) 2 MLJ 310 where the High Court held the temple in question as a private one. See also T.D. Gopalan v. Commr. H.R. & C.E. AIR 1972 SC 1716 where the Supreme Court rejecting the decision of the High Court held the temple as a private religious institution.

6. Bhagwan Din v. Har Saroop AIR 1940 PC 7, 11. Supra p. 187.

to determine whether or not a particular temple was public would have been much easier. "If a temple is proved to have originated as a public temple nothing more is necessary to be proved to show that it is being used as a public temple but if a temple is proved to have originated as a private temple or its origin is unknown or lost in antiquity then there must be proof to show that it is being used as a public temple."¹

But in Ram Saroop Dasji v. S.P.Shahi,² Das, J. pointing out in a subtle way the most distinctive feature distinguishing a public temple from a private one, observed for the Supreme Court that "in a public trust the beneficial interest is vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it answerable to a particular description."³ It is submitted that Das, J.'s careful observation reveals the most important feature of a public religious institution which distinguishes it from a private one where the management and the possession of the endowed properties are in a definite individual or individuals.⁴

At this juncture it may be pointed out that the determination of the question, whether or not a particular temple is a public one, does not depend on any single factor - the question is to be dealt with in each case on the evidence produced. It cannot be said, as we have seen earlier, that

1. Per Hegde, J., G.S. Mahalaxmi v. Shah Ranchhodas, AIR 1970 SC 2025, 2031.

2. AIR 1959 SC 951.

3. Ibid., p. 956.

4. It may be pointed out that the observation of Das, J. does not seem to be original. Patna High Court had already ruled in Ram Prasad v. Ramkishun, AIR 1932 Pat 177, that one test to determine whether an endowment was private or public was to find out whether the founder or his nominees could divert the income of the endowment for their own use. Thus Sahay, J. pronounced for the High Court that "One of the tests to determine whether an endowment is a private family endowment or a public endowment is to consider whether the founder or all the members of the family could divert the income of the endowed property to their own private use or to any purpose other than that expressed in the deed of endowment." AIR 1932 Pat 177, 179. It must be held as an original pronouncement which in effect was given expression in a different language by Das, J. in Ram Saroop's case, AIR 1959, SC 951, 956.

the use by the public will dispose of the problem¹ but the use of the temple by the public is an important factor to decide the character of the temple whether or not it is public.² Existence of the factors such as daily worship, special worship and the participation of members of the public at large in temple festivals, religious processions etc. points to a positive indication of the public character of the temple.³ Again even the nature⁴ of the land on which a particular temple is constructed and the evidence that construction,⁵ repairs, extension⁶ or maintenance⁷ of a particular temple have been carried out with public subscriptions also give the positive impression that the temple is a public one. In Narayan v. Gopal⁸ one factor relied on by the Supreme Court in coming to its conclusion that the temple in question was a public one was that the temple was constructed on a site given by the Peshwa for the benefit of the public. In both Deoki Nandan v. Murlidhar⁹ and State of Bihar v. Charusial Dasi¹⁰ the decisions of the Supreme Court were influenced by the presence of strangers in the

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1. Bhagwan Din v. Har Saroop AIR 1940 PC 7. Supra p. 187. Even earlier in Mundacheri Koman v. Achuthan Nair, AIR 1934 PC 230, it was held in effect that the private character of a Hindu temple would not be changed by the only factor of the admission of the public in it. Thus it was observed there that "Had there been any sufficient reason for holding that these temples and their endowment were originally dedicated for the tarwad, and so were private trusts, their Lordships would have been slow to hold that the admission of the public in later times...would affect the private character of the trusts." - Per Sir John Wallis at p. 234.
 2. G.S. Mahalaxmi v. Shah Ranchhoddas AIR 1970 SC 2025, 2031.
 3. Ramaswami Naidu v. Commr., H.R., C.E. (1974) 2 MLJ 133, 136.
 4. Bhagwan v. Namdeo AIR 1957 Bom 163. The temple in question was held public mainly on the ground that the land on which the temple was constructed did not belong to the founder, a certain widow.
 5. Gulab Chand v. Shri Balaji, AIR 1959 Bom 252.
 6. Sarat Chandra v. Rabindra Nath, AIR 1957 Call 11.
 7. Chintaman Bajaji v. Dhando Ganesh ILR (1891) 15 Bom 612. In that case the local raja conferred on the descendants of the founder some grants of land for the maintenance of the shrine.
 8. AIR 1960 SC 100, 110.
 9. AIR 1957 SC 133.
 10. AIR 1959 SC 1002.

management of the temple. Moreover, the structure of a temple might sometimes be taken into consideration but it is by no means a decisive factor. In Ratnavelu Mudaliar v. Commr. H.R. & C.E.,¹ considerable importance was attached to the outward features of the building to determine its public character but in H.R.E. Board v. Devianai Ammal² it was held that though the temple had all the features of the structure of a public temple, the temple in question was a private temple.

In so far as a public temple and its determining tests are concerned Hegde, J.'s observation is most revealing. His Lordship observed in G.S. Mahalaxmi v. Shah Ranchhoddas³ that

"the circumstances that the public or a section thereof have been regularly worshipping in the temple as a matter of course and they can take part in the festivals and ceremonies conducted in that temple apparently as a matter of right is a strong piece of evidence to establish the public character of the temple. If votive offerings are being made by the public in the usual course and if the expenses of the temple are met by public contribution, it is safe to presume that the temple in question is a public temple."⁴

b. Functions of a Public Temple

There is no doubt that a public temple is meant for providing opportunities for the members of the public for prayer and worship.⁵ But the sole function of the institution is not offering facilities for the spiritual benefit of its worshippers. It is now known to us that long ago a public temple was used as a cultural and social centre⁶ and sometimes it was even used as a Court where disputes between the parties were settled.⁷

1. ILR (1955) Mad 241.

2. AIR 1954 Mad 482.

3. AIR 1970 SC 2025.

4. Ibid., p. 2031.

5. M.N. Srinivasan, Principles of Hindu Law, Vol. 3, 4th ed., Law Publishers, Allahabad, 1970, 2562-2463.

6. Even now Sikh temples in the United Kingdom are also used as educational institutions for the teaching of Punjabi. See Harbhajan Singh Janjua, Sikh Temples in the U.K. and the People Behind Their Management, Jan Publications, London, 1976, passim.

7. Report of the Hindu Religious Endowments Commission (1960-62), Ministry of Law, Delhi, 1962, 14.

In South India managers of different public temples used to take an active part in administration of local affairs but the powers enjoyed by the local organisations of Brahmins were subject to the ultimate sanction of the ruling authority.¹ During the reign of the Vijaynagar kings the temples used to control not only the endowed lands but also the regulation of tenancies and leases.² A large measure of devolution of royal power was in evidence but this devolution of power seemed to be concessionary on the part of the sovereign.

But the powers and privileges as enjoyed by some devaswoms (i.e. temples along with endowments attached to them) in medieval Malabar (Kerala) and the functions as performed by them were by no means the functions of public temples as generally we understand them. All important devaswoms had their own independent jurisdictions called sanketams. "These sanketams were well-defined and in some cases they were of large extent. Since most of the temples and the lands attached to them were originally the creation of the Brahmin lords and communities these sanketams were places in which they possessed independent jurisdiction. Within these limits the temple corporations exercised sovereign authority."³ Moreover, it is interesting to note that the Brahmins who founded the temples vested the superintendence but not management of the temple properties in the sovereign authority. The sovereign and the local chieftains were only the protectors of sanketams.⁴ Sanketams seemed to be small states within a State but their power was not subject to the control even of the sovereign. "Some...may have been reminded of the Reformation in England. Had the church in England remained indifferent to wealth i.e. had it refused to accept offerings beyond a fixed minimum, it could quite

1. M.G.S. Narayan, Re-interpretation of Indian History, College Book House, Trivandrum, 1977, 51-58.

2. K.A. Nilakanta Sastri, Development of Religion in South India, Orient Longmans, Bombay, 1963, 130.

3. P.K.S. Raja, Mediaeval Kerala, Annamalai Univ., Annamalainagar, 1953, 258.

4. Ibid.

possibly have retained the affections of the state."¹ It seems that it was the emergence of an independent power by way of the institution of public temple threatening and influencing the course of policy at all levels which laid them open to control and ultimately to a break with the past. It is this factor which influences the State to proceed with conscious determination to transform the political foundation of the temples under the guise of reform and this determination continues even to the present day.

Apparently temples and other religious institutions "are businesses, operated for the profit of their managers."² In Mahadeva v. H.R.E. Board,³ temples are discussed as business concerns. As the spiritual purpose of a donor is fulfilled at the moment of divesting the property or making offering in favour of a deity, Hindus are not concerned with the dedicated assets and income thereof. To a Hindu worshipper "the dedication is what counts"⁴ but the same cannot be said generally of Hindu shebaitis. Countless cases in which we find disputes between the parties relating to shebaiti rights testify to the fact that shebaitis in general are more interested in the property (shebaiti being property) of the debutter than in its religious aspects. In this context it may be pointed out that the members of the public have deeper regard for religious endowments than the shebaitis have. Their expectations are different. Nominally, "The managers and the archakas have far less at stake than the worshippers. Their interest is that of servants or agents. The worshippers have a deeper interest in the integrity

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1. Derrett, "The Reform of the Hindu Religious Endowments", cited above 311-336, 336.
 2. Derrett, Critique, 375.
 3. ILR (1956) Mad 624, 633. The case was concerned with the question whether or not the character of the temple was private or public.
 4. Derrett, Critique, 376-377.

and the well-being of the institution."¹

Worshippers go to a temple for worship and they make their offerings to the deity for their spiritual satisfaction. They are not at all concerned with the destination of their offerings. "The actual enjoyment of the object given can be left to the trustees, the priests, and the touts and hangers-on who attach themselves to the temple as a business."² This impression about the temple managers and their servants becomes deeper when someone goes through the law reports. Thus in Rama Rao v. Board of Commrs., H.R.E.³ the archakas claimed half of all offerings. In Shahzad Kunwar v. Ram Karan⁴ priests claimed to be the shebaites of the temple. In other words, priests wanted more material benefits from the debutter than what they were receiving as servants of the shebaites of the temple in question. It seems that for those who go there for worship and making offerings, temples are religious institutions, but for those who work there or are supposed to look after the temples they are business places, money-earning sources, to be exploited for their material gratification. The attitude of Hindu shebaites and priests towards debutter property is in striking contrast with the world at large. Priests in other religions treated votive offerings, for example, with scrupulous care - maintaining, it seems, inventories, and eschewing speculation.⁵

In this context, it may be added that worshippers do not always go to the temples for their spiritual benefit. They use the temples and make their offerings to the deity so that some unfulfilled wishes materialise.

1. Per Seshagiri Ayyar, J., Venkataramana Ayyangar v. Kasturi Ranga Ayyangar ILR (1917) 40 Mad 212 (FB) 225. In that case two worshippers filed the suit against the archakas of a temple, praying for a declaration that the perpetual lease of the temple-income in favour of the archakas was void. The view of the case was approved by the Supreme Court in Bishwanath v. Radha Ballabhji, AIR 1967 SC 1044, 1047, in which the suit was filed by an idol for a declaration of the title and possession of its property from a person in illegal possession. This case will be dealt with in detail in the 5th chapter. On the point in question, see Derrett's RLSI, 486.
2. Derrett, RLSI, 487. 3. AIR 1965 SC 231. 4. AIR 1965 SC 254.
5. B.A. Litvinskiy and I.R. Pichikiyan, "The Temple of the Oxus", J.R.A.S., 1981, no. 2, 133-167, 136.

It is painful to point out that a large number of worshippers go to temples with their gifts not to satisfy their spiritual needs but "primarily for the propitiating of God."¹ Vows are made for material gains e.g. "to obtain a son or to recover from a disease."² Businessmen make lavish donations so that their interests are protected.³ So, we find that gifts are given to God by the worshippers not for spiritual satisfaction but for receiving some kind of favour from the deity. Gifts are made to temples as if God is bribed to get material benefit for the worshippers. But there are cases when devotees make offerings simply to get merit.⁴

Again, as worshippers do not bother the way their offerings are spent, temples and charities flourish so that systematic exploitation of the endowed property and the offerings poured into it could be made by the temple-trustees and their helpers. We have already seen that the temple and its income are not the monopoly of its trustees, hereditary priests also have vested interests in their temples. Hereditary priesthood, where it exists by custom, is recognised as a property. Thus in Raj Kali v. Ram Rattan⁵ where the main question for determination was whether a female is entitled to succeed to the office of a hereditary priest, the Supreme Court recognised the right to office of a hereditary priest as a property where emoluments were attached to such a priestly office. Disputes resulting in litigations involving shebait, priests and even pandas⁶ over their shares of offerings

1. Rama Rao v. Board of Commrs., HRE, AIR 1965 SC 231; the same view was expressed by G-D. Sontheimer, op.cit., 71.

2. Derrett, RLSI, 481.

3. Ibid.

4. Derrett, RLSI, 488. See also Ramaswami v. Commr. H.R. & C.E. AIR 1964 Mad 317, 319. The only question for determination was whether the shrine in question was a temple within the definition of the Madras Hindu Religious and Charitable Endowments Act, 1951.

5. AIR 1955 SC 493.

6. Pandas are pilgrim guides attached to temples. For a litigation involving pandas' right see Nar Hari v. Badrinath AIR 1952 SC 245.

are common. "Again and again shebaita claimed that the idol was God Almighty who would reward the generosity of the pilgrim a thousand-fold (centuplum accipies), and when the coins were once within their grasp asserted that these were personal presents belonging entirely to them."¹

In Venkataramana Ayyangar v. Kasturi Ranga Ayyangar,² Seshagiri Ayyar, J. in his judgement gave us the idea of the apparent functions of a public temple when his lordship observed that "In all the important temples in South India, devotees are called to pay a fixed sum for the archana that has to be performed. This includes the wages of the person who performs the archana, the cost of the flowers, the remuneration of the person who recites the archana etc. and swarnapushpam offered to the deity. A practice which distributes a portion of the levy to the persons who bring the flowers, who recite the holy names and who actually do the puja, will not be illegal..."³ So for devotees temples are places of worship but for others who are actively associated with these institutions as managers, pujaris and persons working for the secular side of the temples, they (temples) are centres primarily for their living. No wonder that so many decided cases in the Courts are related to temples where vested interests of so many persons are involved.

Public temples in most of the Indian states are controlled by statutes made by different states' Assemblies and at least it is gratifying to see that they are susceptible to Governmental controls.⁴ It is shocking to note that no statute for controlling Hindu public religious endowments has yet been introduced by the State Assembly of West Bengal.⁵ The new methods

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1. Derrett, RISI, 489-490. See Manohar v. Lakhmiram ILR (1887) 12 Bom 247 supra, p. 137, where the sevaks were held accountable for the right disposal of the offerings which they claimed to belong to them. We have seen earlier a case where the plaintiff claimed a public temple to be his personal property. See Raja Bira Kishore v. State of Orissa AIR 1964 SC 1501.
 2. ILR (1917) 40 Mad 212 (FB).
 3. Ibid., p. 220.
 4. R. Dhawan, "The Supreme Court and the Hindu Religious Endowments, 1950-75", (1978) 20 JILI 52-102, 78.
 5. Derrett, Critique, 374.

of controlling and administering public temples through statutory provisions as adopted by many states in India, recognising the interest of the public, place the responsibility of looking after the endowed properties in the hands of a public body. The overall aim of this public body is to eliminate malpractices of the temple managers and to make proper use of temple funds.¹

In this context it may be pointed out that legislations controlling Hindu public religious endowments exist piecemeal - different statutes for different states² and even separate statutes for a particular public temple.³ Legislation should not be different for different states and there should be a single statute covering all public religious and charitable endowments. Moreover, it should not be limited to Hindu religious and charitable endowments. Reform is needed in this field whereby a legislation like the present Bombay Public Trusts Act, 1950, may be introduced by the Indian Parliament so that all public religious and charitable endowments of different communities become susceptible to a single statute. If the Bombay Act could work in the State of Bombay for all communities⁴ then a would-be central Government Act could well apply to public religious or charitable endowments of all communities in India. Then at least we could see the beginnings of the uniform Code⁵ to which our Constitution aspired

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1. Derrett, "The Reform of Hindu Religious Endowments", D.E. Smith (ed.), South Asian Politics and Religion, Princeton, Princeton Univ. Press, 1966, 311-356, 329. See also Mudaliar, Secular State and Religious Institutions in India, op.cit, specially p.242 in her concluding chapter where she points out that the State of Madras was concerned primarily "with the mismanagement of funds by trustees rather than with questions of faith, dogma or ritual...."
 2. E.g. The Bombay Public Trusts Act, 1950 (Bombay Act 29 of 1950); the Madras Hindu Religious and Charitable Endowments Act, 1959 (Madras Act 22 of 1959).
 3. E.g. the Rajasthan Nathdwara Temple Act, 1959.
 4. See Chapt. VIIA. Sec 56C of the Bombay Public Trusts Act, 1950 provides that the provisions of the chapt VIIA are applicable to all temples, mosques or endowments created for a public religious or charitable purpose.
 5. Art. 44 of the Constitution of India reads: "The State shall endeavour to secure for the citizen a uniform civil code throughout the territory of India."

from the moment of its birth. But there should preferably be a uniform statute dealing with both private and public religious endowments.¹

Section 5 (a) PRIVATE ENDOWMENT AS A FUNCTION OF FAMILY MANAGEMENT;
(b) TERMINATION OF AN ENDOWMENT

a. Private endowment as a function of family management

So far as public religious endowments are concerned, they are controlled in most of the Indian states by the state statutes² but private religious endowments are not subject to those statutes. Even the voluminous "Report of the Hindu Religious Endowments Commission"³ has not dealt with private endowments; it⁴ was mainly concerned with the working of the Indian Constitution⁵ in relation to temples and other public endowments.⁶ It is extraordinary that no investigating body has yet been set up to see the way private trusts are being administered. Perhaps it is supposed that Courts are able to detect nominal debutters (above, p.163), but this presupposes litigation, which inevitably brings with it delay and chicanery.

Private endowments among Hindus are quite as common as public endowments and they can usually be found in Northern India,⁷ especially in West Bengal. The family shrine is extremely common in the South but it is uncommon for landed property to belong to its deity or deities. In this connection it may be pointed out that Hindu text-writers did not make any distinction between a religious endowment having as its object the worship of a family idol and a religious endowment which is meant for the benefit of the

1. See below, sec. 6 of the 6th chapter.

2. Above, sec. 4. Derrett, Critique, 374.

3. Op.cit., Ministry of Law, Delhi, 1962.

4. The Supreme Court generally approved the Report in K.A. Samajam v. Commr., AIR 1971 SC 891 where it dealt with the rights of hereditary trustees.

5. On this point see a comment on the report by S.C. Bhat, "A Note on the Report of the Hindu Religious Endowments Commission, AIR 1964 Jnl., 98-99.

6. Derrett, Critique, 374.

7. P.R. Ganapathi Iyer, op.cit., CX III.

public. "This distinction which obtains in English law with respect to charities, is not to be found in the Hindu text-writers."¹ This distinction is of much later import.² In all Hindu religious endowments, dedications involve renunciation of property in favour of God³ and as we have seen they are meant for the good of the universe.⁴

But the idea of the shebait and that of the trustee is a modern one.⁵ The oft-quoted observation of West, J., that "Property dedicated to a pious purpose is, by the Hindu as by the Roman law, placed extra commercium..."⁶ and the principle involved in it seem to have been known to Hindus long ago who, though not in all cases, taking advantage of the principle made dedications not so much to satisfy their spiritual needs as to fulfil their secular purpose by defrauding creditors or by evading various legal provisions.

"Hindu family religious trusts were invented as a development of the original religious endowment much on the pattern of Islamic wakf, so that property might remain in the family immune from creditors and rapacious tax-gatherers, and free for enjoyment among descendants and others irrespective of a once customarily harsh law of succession."⁷

It often happens, as we have seen, that religious endowments are created only "for the purpose of defrauding creditors or for the purposes of defeating the provision of the laws about descent and for preventing alienation."⁸

Even through a valid endowment one can fulfil both the purposes of acquiring religious merit and making secular investment perpetually for oneself and one's nominees. In case of a rich foundation

"the possession of large funds by the idol gives the shebait for the time being a disposition over funds which the personal law and the fiscal law also would not have allowed them had it

1. Per Charles Sergeant, J., Rupa Jagshet v. Krishnaji Govind ILR (1884) 9 Bom 169, 172.

2. G. Sarkar Sastri, op.cit., 7th ed., 862. 3. Derrett, IMHL, 493.

4. Above, p.155; I-T. Commr. v. Jogendra Nath AIR 1965 Cal 570, 583.

5. J.C. Ghose, op.cit., 278.

6. Manohar Ganesh v. Lakhmiram ILR (1887) 12 Bom 247, 264.

7. Derrett, "The Reform of Hindu Religious Endowments", op.cit., 334.

8. J.C. Ghose, op.cit., 284.

passed by succession. It is a perpetuity which grows in value, if wisely administered, and is a fine example of religion and expediency joining hands."¹

The shebait of an idol is empowered to spend as much as he thinks fit for carrying out the worship of the idol and to that effect he can spend at his discretion the bare minimum on the idol's needs. In Kumaraswamy Asari v. Lakshmana Goundan² a priest founded a temple and bought some lands in the name of the deity and in his name out of the income from offerings made by various devotees. He spent some of the income for the purpose of the temple and the rest for himself. The same mode of expenditure was made by his son and grandson. The Madras High Court ruled that the surplus income as was used for the benefit of the Pujari was not illegal.

A founder of a public temple might allow, with some restrictions, members of the public to enter a temple and might not end his and his family's rights altogether. The expenditure in a public temple largely depends on income expected from the offerings of devotees. A rich foundation attracts gifts and offerings, and even fees may be charged for worship in the sanctum. Technically it is a public foundation but for all practical purposes it is a device to earn income for the family to be enjoyed generation after generation. The income is sometimes solely pecuniary in nature. "The right to be a manager of such a temple is a valuable right. Small wonder that attempts are made to sell it."³

Again, some temples are technically private but as a matter of fact they are hardly distinguishable from public temples. For members of the public are freely admitted in those temples so that shebait may make profit from offerings of the devotees. In Bhagwan Din v. Har Saroop⁴ members of the public were allowed to visit the temple freely, they made their offerings

1. Derrett, RLSI, 491.

2. ILR (1930) 53 Mad 608.

3. Derrett, IMHL, 497.

4. AIR 1940 PC 7.

of worship which in reality were enjoyed by the members of the family in whom the management of the temple was vested, yet the Privy Council, as we have seen, ruled that the suit property was private property which was not even debutter because of the technical reason that the suit property was a private grant made to one Darya Gir to be enjoyed for generations. But it must be pointed out that though the land in question was not dedicated it was used as such to attract the members of the public so that money could be made through their offerings. In my opinion, the decision in Bhagwan Din's case¹ (criticised above at p.189) must not be applied to the facts of the cases of similar kind. For future examples may be set by unscrupulous Hindus by establishing temples in their private lands, without being dedicated, thus allowing members of the public who, in fulfilling their religious needs, may make offerings of worship only to be enjoyed subsequently by the founders and their families. The anomaly, it must be stressed, lies not in the discrepancy between the dedication to the deity and the founder's absorption of the gift, but in the law's failing to protect eo nomine the institution, the legal person, namely, the deity. As we have seen - and perhaps should be stressed - Hindu law admits that the shebait, priests, etc., may feed on the remnants of offerings to the deity.

At this juncture it must be stressed that nobody has been in a position to pinpoint the date when the institution of private endowment first came into being; and the question as to why Hindus went in for private endowments has been neither explained nor dealt with in detail by any Indian text writer or in any judicial decision. But Derrett's account of the background and motives behind private endowments seems to be not only plausible but also exhaustive. Thus the learned author observed that

1. AIR 1940 PC 7.

"long ago it was discovered that neither a grasping king, nor selfish relatives or co-villagers would readily seize property which, while under the control of a man's descendants and representatives, was legally the property of a religious endowment. The concept of trust was not absent from the then Hindu law. While the law of succession passed the residue of the property to a particular relation who might maintain females and other dependants inadequately, and the same difficulty might arise when the local ruler escheated the estate for want of male issue, a fund dedicated to the family idol was safe for purposes of which the manager approved. In the case of family idols the cost of their worship in clothes and ornaments, and daily Puja by a Brahmin, could be (and still is) very small. The idol's food consists in the savour of food cooked for the family and placed before it. Its bath requires hardly any expenditure, yet a fund of several thousands of rupees might be dedicated to it. The manager was entitled to spend as much in worship as he thought fit. If he chose he could attend to the idol's "needs" at the meanest possible level, spending the remainder of the income on himself and the members of the founder's family at his discretion. The motives of dedication to an idol were confirmed by the revenue laws and to this day religious trusts are exempt from income tax. Thus such foundations serve the same purpose as an investment, permanent as to capital, and flexible as to employment of the income. Small wonder that religious endowments, particularly private endowments, figure largely in the law-reports and give rise to dubious transactions amounting in some cases to fraud."²

Derrett is not claiming at all that his remarks constitute the whole philosophy behind all Hindu private religious endowments. What the learned author is suggesting is that in a large number of cases of private endowment unscrupulous Hindus make bogus dedications so that they and their families can enjoy extra material advantages attached to religious endowments, as opposed to secular investments, generation after generation. It is therefore a sub-department of tax-planning and the legislation of 1961 has by no means ended its raison d'etre.

Some temples in West Bengal are legally private but they are in practice as good as public religious foundations. We have remarked on this above (p.203). For example, the Kalighat Temple of Calcutta is still designated as a private religious establishment in spite of the fact that the temple

1. For a case of fraud see Iswar v. Gopinath Das AIR 1960 Cal 741. For a case of forgery see Durgaprosad v. Sri Sri Rameswar Jew Siba Thakur AIR 1981 Cal 92. In that case the Court at first instance accepted the plaintiff's version that the document in question was fictitious.

2. IMHL, 496. Emphasis provided. The author's remarks regarding revenue are of course only partially untrue since 1961.

attracts visitors¹ from all over India. The expenditure of the temple may well be met with surpluses from gifts to the goddess Kali. Yet a part (pala) of the hereditary shebaiti was once mortgaged for a financial consideration and the transaction was held valid² on the basis of long established custom to that effect. Though the name of the Kalighat temple was not mentioned, the Ramaswami Aiyar Report³ aptly points out that

"It is relevant to observe in this connection that courts and tribunals have refrained in most cases from investigating and taking into account the basic idea underlying the dedication of temples and mutts. They have too often taken for granted that there can be private temples to which the public contribute by way of offerings and donations.... The trustees of Tarakeswar Temple in West Bengal claim that institution is entirely their private property and, though the trustees receive donations and gifts from the public and public resort to the worship of the image, they claim that the image is their private property and that they can withhold admission to the public into the institution."⁴

The Report also mentions the Dakshineswar temple which claims to be a private temple in spite of the fact that it receives offerings and donations from the public. One point the Report omits to mention is that the trustees of the aforesaid temples, or temples of the kind will invariably incline to claim that their temples are private ones, because they fear that if it is a public religious endowment, "it will be susceptible to governmental control".⁵

From different law reports and journals we can see that the Supreme Court and the different High Courts deal with as many private religious endowments as with public religious trusts. In the vast majority of the cases concerning private endowments, the dispute between the parties is not so much regarding the way worship should be done as with the right to

1. The writer has personal experience about this.

2. Mahmaya v. Haridas, AIR 1915 Cal 161.

3. Report of the Hindu Religious Endowments Commission (1960-1962), op.cit.

4. Ibid., p. 40.

5. R. Dhavan, "The Supreme Court and Hindu Religious Endowments", 1978, Journal of the Indian Law Institute, 52-102, 78.

manage the properties of idols. Shebaita are supposed to do seva to the deities but they are in most cases found to fight for their rights in the properties of the deities. "If the shebait is a man of unimpeachable integrity, things would proceed quite alright, else under the mask of juristic personality of the idol any kind of fraud¹ may be committed."² It is suggested that urgent reform is needed in the sphere of private endowment. Shebaita must not be allowed to maladminister religious endowments to their material advantage and they must be compelled to use them for religious purposes. This may have the effect of putting a stop to the growth of new private endowments of secularising or enfranchising existing endowments, but the state need not be concerned since the belief that the deities control the weather, etc. is fading and there are enough public temples. The state has made no difficulty about secularising funds dedicated for the support of dancing girls attached to public temples.

If therefore the manager of a Hindu family decides to devote a legally-acceptable proportion of the family surplus to a deity under family control he will know that the income will not be available for ordinary family purposes. To achieve this obviously a change in the law will be required as well as some new form of implementing such a change. The present tendency to submit such income to income-tax only touches the fringe of the problem, while the abolition of the joint family as has occurred in Kerala cracks many small nuts with a hammer.³

b. Termination of an Endowment

The question whether an endowment of a family idol can be put an end to, ie, enfranchised, is a controversial one and to that effect no uniform rule

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1. See Iswar v. Gopinath Das AIR 1960 Cal 741 In that case the shebait granted a lease of the endowed property in fraud of the deity.
 2. S.R. Baj, "Juristic personality of an Idol in Hindu Legal Philosophy", (1963) 3 Jaipur Law Journal, 229-236, 233.

3. See Kerala Joint Hindu Family System (Abolition) Act, 1975 (Kerala Act 30 of 1976),

covering the whole of India has yet been laid down in any decision of the Supreme Court. It has been held in some decisions¹ of different High Courts that the consensus of the whole family might convert a private debutter into a secular property. Such a conclusion would be wholly consistent with the outlook of the average shebait. To fortify their decisions supporting the view that a private endowment of an idol might be terminated, the High Courts used an observation made by Sir Montague E. Smith in the Privy Council in Konwur Doorganath Roy v. Ram Chunder Sen.² In that case the main issue was whether or not the alienations by the shebait for raising money for the benefit of the endowed property were justified. Ruling in the affirmative on the said issue Sir Montague made also an obiter remark that "Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it, but in the case of a family idol the consensus of the whole family might give the estate another direction."³ This piece of guesswork⁴ appears to have been based on a false analogy between members of the family and the beneficiaries of a trust other than a trust for a class. Of course, as with the case of an infant, the Court's permission would be required to effect such a termination of the idol's interests or indeed the best friend of the idol must be heard - a person not holding an interest adverse to the idol.

The obiter dictum of Sir Montague was accepted and given effect to by the Calcutta High Court in Govinda Kumar v. Debendra Kumar.⁵ In that case

1. Govinda Kumar v. Debendra Kumar (1908) 12 CWN 98; Tulsidas v. Siddhinath (1914) 20 CLJ 315; Narayan v. Narasing AIR 1951 Cri 60; Senthivel v. Kulandaivel ILR (1970) 2 Mad 95.

2. (1876-7) 4 IA 52.

3. Ibid., p. 58.

4. I am told by Prof. Derrett that the late Prof. S.E. Vesey FitzGerald, QC, strongly objected to this obiter dictum from his knowledge of Hindu law acquired in India.

5. (1908) 12 CWN 98.

a major point for determination was whether the suit properties were originally debutter and had ceased to be so. The finding of the Court was that the properties in question were at one time debutter but later on they were converted into secular properties by the consensus of all the members of the family. Relying on the said obiter remark of Sir Montague E. Smith and referring to G.C. Sarkar Shastri's and Mayne's books on Hindu law, Rampini, C.J. and Sharfuddin, J. of the Calcutta High Court held that the debutter "properties can become secular by consensus of the whole family, if the dedication was to the worship of the family idol."¹ The same view was held by the same High Court in Tulsidas v. Siddhi Nath² when it accepted the findings of its lower Courts that the land in question was originally debutter "but the shebait put an end to its debutter character by consent."³

But the aforesaid view as expressed in Govinda Kumar's case,⁴ based on the obiter dictum of the Privy Council case, was not followed in any decision of the Calcutta High Court ever since it was rejected in the decision in Chandi Charan Das v. Dulal Paik.⁵ In that case the appeal in the High Court arose⁶ out of a suit for partition and other reliefs. The main issue to be decided was whether the endowment in question was absolute debutter or a mere device for the benefit of the family. Chatterjea, J. referring to an observation in Sri Sri Gopal Jew Thakur v. Radha Binode Mondal⁷

1. (1908) 12 CWN 101.

2. (1914) 20 CLJ 315.

3. Ibid., p. 315.

4. (1908) 12 CWN 98.

5. AIR 1926 Cal 1083 = (1926) 44 CLJ 479.

6. Earlier in Sripati v. Krishna (1925) 41 CLJ 22, it was held that once the property was dedicated to an idol, the dedication was irrevocable. It was also ruled that the shebait jointly could change rules for the benefit of the endowment but without affecting the rules of the founder in any vital matter.

7. (1925) 41 CLJ 396 = AIR 1925 Cal 996.

pointed out that the issue whether the consensus of all members of the family might put an end to a family endowment was not decided¹ by the Judicial Committee in Konwur Doorganath's case.² However, in the decision of the same case Page, J. refusing to accept the principle as laid down in the obiter dictum of the Privy Council, held in his separate judgement that "it must not be taken that I should be prepared to hold that if all persons interested in the worship of the deity are agreeable they can validly convert debutter into secular property, or that such a doctrine can be sustained as being in accordance with Hindu law."³

The same view (apparently highly consistent with English notions of a trust) as held by Page, J. on the issue was expressed by Rankin, C.J. forcefully in Surendra Krishna Ray v. Shree Shree Iswar Bhubaneswari Thakurani⁴ which dealt with the interpretation of the terms of a deed. In that case, a question was also raised whether the debutter character of the suit properties was validly terminated by the nominees of the founder. His Lordship observed that

"I am not prepared to hold on the strength of the well-known passage in the case of Konwur Doorganath Roy v. Ram Chunder Sen that there is in Hindu law any warrant for the proposition that at any particular time by consent of all the parties then interested in the endowment, a dedication can be set aside. The passage so much relied upon, does not appear to me to be intended as a considered opinion to that effect, and before importing any such doctrine into Hindu law there is much to be considered."⁵

In so far as the termination of a private Hindu religious endowment is concerned the Calcutta case of Sukumar Bose v. Abani Kumar⁶ is by far the

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1. (1926) 44 CLJ 479, 485.
 2. (1876-7) 41A 52.
 3. (1926) 44 CLJ 479, 489.
 4. AIR 1933 Cal 295 = ILR (1933) 60 Cal 54.
 5. ILR (1933) 60 Cal 54, 71. In Ehabatarini Debi v. Ashmantara Debi, AIR 1938 Cal 490, 499, where the main issue was related to the devolution of shebaiti Khundkar, J. ruled to the effect that once the property is absolutely dedicated to an idol, the consensus of the whole family could not convert a debutter property into a secular one.
 6. AIR 1956 Cal 308.

most important one. The facts of that case were directly concerned with the efficacy of the application of the principle as evolved from the obiter remark of Sir Montague Smith. The dispute between the parties was whether the suit property, once declared by the Court as absolute debutter, continued to be so, in spite of the fact that the descendants of the founder had partitioned the property as a secular one. Accepting the view on the subject as expressed in Chandi Charan's¹ and Surendra Krishna Ray's cases² and relying on the principle as evolved in Kanhaya Lal v. Hamid Ali³ and Pramatha Nath v. Pradhyumna Kumar⁴ that when members of a family would like to usurp the property of a family idol, the deity's interest should be watched, when necessary, by the appointment of a disinterested person, Das Gupta, J. pronounced that

"the principles of the necessity of protecting the deity's interest by some disinterested person as laid down by the Privy Council in 1925 PC 139⁵ (AIR) and 1933 PC 198⁶ (I) (AIR) and followed in numerous cases, cannot be disregarded when the question is of the members of the family divesting a deity of its property. In view of these later authorities, the observation in 4 Ind App 52(PC) (A),⁷ cannot be taken any longer to be good law."⁸

It may be observed in passing that it is well known that where the deity is fairly and properly represented the sale of the image and of the temple may not be sanctioned by the Court in the deity's interest.⁹

1. AIR 1926 Cal 1083.

2. AIR 1933 Cal 295.

3. AIR 1933 PC 198

4. AIR 1925 PC 139.

5. Pramatha Nath v. Pradhyumna Kumar AIR 1925 PC 139. Supra p. 138.

6. Kanhaiya Lal v. Hamid Ali AIR 1933 PC 198.

7. Konwur Dooganath's case (1876-77) 4 IA 52.

8. AIR 1956 Cal 308, 311.

9. "Properties of an idol are normally inalienable, the alienation of a temple is commonly regarded as sacrilege, and procedure exists (for example by the appointment in an appropriate case of a receiver to receive rents and profits such as offerings) whereby the claims of the decree-holder can be met over a period of time. Since worship need not be costly, necessity can never justify transactions which imperil the very endowment itself" - Derrett, IMHL, 502. See below pp. 280-281.

In so far as the Calcutta High Court is concerned it seems that the controversy regarding the obiter dictum of Sir Montague Smith is over, because of the convincing arguments put forward against it by Das Gupta, J. in his decision in Sukumar Bose's case.¹ In Panna Bannerjee v. Kalikinkor² where the subject-matter was alienation of debutter property Deb, J. held that "with all respect I am against this obiter dictum of Sir Montague Smith." But the view of the Calcutta High Court has strangely not been accepted as settled law by other Indian High Courts.³

In Narayan v. Narasing⁴ where the issue to be decided by the Orissa High Court was whether a perpetual lease of a family endowment could be created *without* legal necessity, it was observed that in case of a family endowment the members of the family "could even withdraw the endowment from the trust by their consensus"⁵ as held in Konwur Doorganath v. Ram Chunder...."⁶

But in this context the most interesting case is the Madras case of Senthivel v. Kulandaivel.⁷ In that case, the Madras High Court has shown us the extent to which a Court can go on building premises on its own from which it could deduce the conclusion to suit its own judgement. It referred inter alia to certain decisions of the Calcutta High Court and the obiter dictum of Sir Montague Smith. To support the view that the consensus of all the members of a family interested in the worship of the deity could turn a debutter into a secular property the Court referred to Chandi Charan Das v. Dulal Chandra Paik.⁸ Thus it was observed that "In

1. AIR 1956 Cal 308.

2. AIR 1974 Cal 126.

3. Radha Krishna Das v. Radharamana Swami AIR 1949 Ori 1; Narayan v. Narasing Charan AIR 1951 Ori 60; Bairagi Das v. Uday Chandra AIR 1965 Ori 201; Senthivel v. Kulandaivel ILR (1970) 2 Mad 95.

4. AIR 1951 Ori 60.

5. To that effect the same view was expressed in Bairagi Das v. Uday Chandra AIR 1965 Ori 201, 204. 27-28. The case was concerned with the alienation of deities with their properties under a deed of gift.

6. AIR 1951 Ori 60, 62.

7. ILR (1970) 2 Mad 95.

8. AIR 1926 Cal 1083 = ILR (1927) 54 Cal 30.

Chandi Charan Das v. Dulal Chandra Paik...the principle that debutter property can be converted into secular property by the consensus of the whole family and that consensus should be by all members, both male and female, who are interested in the worship of the deity, was laid down."¹ With due respect, no principle as such was laid down in Chandi Charan's case.² The observation of Chatterjea, J. that

"even if the consensus of the whole family can convert an absolute debutter property into secular property such consensus must be of all the members, male and female, who are interested in the worship of the deity...In the present case defendant N.4 did not join in the compromise...."³

is not the law that was laid down there but the principle of the case was in the observation of Page, J. already quoted earlier, to the effect that the consensus of all members interested in the worship of a family deity could not convert a debutter into secular property. Again, in the present case, a trust was created but the purposes for which it was created at its inception were not known. The Court accepted it as a private trust. It made a distinction between the private religious trust in question where there was no dedication in favour of an idol and the private family endowment made in favour of a family deity. It may be pointed out that Sir Montague Smith's dictum in Konwur Doorganath's case⁴ was essentially related to a private religious endowment made in favour of an idol but strangely enough the Madras High Court held that "the case of a private trust of the kind we are concerned which falls into different category to which the observation of the Privy Council in Konwur Doorganath Roy v. Ram Chunder Sen can still apply".⁵ It is the extension of a principle which was not accepted by great judges of the Calcutta High Court. The judgement in the present case referred to a principle as alleged to be laid down in a Calcutta case (i.e. Chandi Charan Das v. Dulal Chandra Paik)⁶

1. ILR (1970) 2 Mad 95, 104.

2. AIR 1926 Cal 1083 = ILR (1927) 54 Cal 30.

3. AIR 1926 Cal 1083, 1086.

4. (1876-77) 4 IA 52. Supra p.208.

5. Per Srinivasan, J., ILR (1970) 2 Mad 95, 111.

6. ILR (1927) 54 Cal 30.

which as a matter of fact, was not done in that case.

It should be remembered that the principle referred to in the obiter remark of Sir Montague Smith was not really laid down in Sir Montague's dictum. It was pointed out by Chatterjea, J. in Chandi Charan's case¹ when his Lordship pronounced in Konwur Doorganath's case² that "their Lordships did not decide the question. There was in fact no question of consensus of the whole family in that case, for their Lordships observed in the next sentence "No question, however, of that kind arises in the present case".³

Now, when an endowment becomes impracticable as long as the general charitable intention of the donor can be sifted out of the terms of an endowment the Court can frame a scheme and apply the funds cy-pres. But a problem may arise if the persons interested in the endowment no longer follow the founder's beliefs and if they want to apply the funds for purposes different from the original purposes of the endowment.⁴ If a single person follows the faith of the founder and if he has an interest in the endowment, then the original purposes must be taken as the guide. For the endowment is a juridical person, not swallowed up in the character of the family. The consensus of the whole community could however redirect the endowment to different purposes of a different belief or different objects of charity but as Derrett argues convincingly "Apart from statute, however, there can be no question of even unanimous redirection which amount to a breach of trust."⁵

Again, if an endowed property is converted into a secular property by the unanimous approval of all the members of a family, here the real question is not the conversion of the debutter, but its usurpation, because the ownership

1. (1926) 44 CLJ 479.

2. (1876-7) 4 IA 52.

3. (1926) 44 CLJ 479, 485.

4. Derrett, IMHL, 519.

5. Derrett, ibid., p. 519.

is vested in the deity. As is notorious, adverse possession will never give title to the usurped trust funds. It is only the State which by an Act of the legislature can take away individual ownership for social needs, and the deity is not excepted.

It may be argued that though the principle involved in the well-known obiter dictum of Sir Montague Smith cannot be supported, because it is not in accordance with the present Hindu law, it might have served or may be used to serve some social purposes. In cases where the principle was accepted, the endowed properties involved therein, which could have been free from the rules against perpetuity, became available on the market to change hands and being secular properties became sources of revenue (e.g. estate duty) for the State. However, in cases where the Courts gave a verdict in favour of the families who converted the debutter properties by their unanimous consent, they should not have ruled in favour of the families, because the members of the families being disloyal to the wishes of the founders made a clear breach of trust which should not have been condoned by any legal system. If families are not interested in carrying out the purposes of endowments then it is the State, not the families which should own those endowed properties for the good of the community at large and reform may be made to that effect.

In conclusion of this study it may be pointed out that if the Court approves the view that a debutter property can become secular by consensus of the whole family, a day may come when the shebait as an institution in the field of private religious endowment may come to an end. The institution of shebait can be conceived of only in relation to endowment. In other words, the existence of the institution depends upon the existence of the institution of the Hindu religious endowment. A founder may not want the termination of an endowment but his heirs being less interested in the object than the founder himself might agree to terminate the endowment.

It could be argued that founders actually relied on their remoter descendants being held entitled to convert the foundations' assets by unanimous consent! We must preserve two principles: (i) on the one hand breach of trust must be repressed and the culprits made personally liable; and to this end procedure should be devised even in the case of private endowment for the deity to be protected notwithstanding negligence, fraud, collusion, or misappropriation of the shebait's; while on the other hand (ii) income surplus to actual expenditure on the idol's worship etc. should be amenable to assessment to tax. The possibility that if these principles were upheld private endowments would cease to be created is not a matter which need concern the State.

CHAPTER IV

SHEBAITI (MANAGEMENT) OF DEBUTTER

Section 1. WHAT IS SHEBAITI?

When a property is dedicated absolutely to a deity the property vests in the deity as a juristic person¹ but the management of the debutter is entrusted to a person called a manager or a shebait. The "possession and management of the property belong to the shebait".² A shebait as the human ministrant of the deity³ is empowered to do whatever is necessary for its service and the preservation of its endowed property.⁴ For all purposes he represents the deity.

In so far as debutter property is concerned the shebait is in a position of a trustee but "as regards the service of the temple and the duties appertaining to it, he is rather in the position of the holder of an office of dignity".⁵ But it may be pointed out that a shebait is not a trustee in the English sense of the term. The legal position of a shebait in contrast to a trustee in the technical sense was pointed out in the decision in the leading Privy Council case of Vidya Varuthi v. Balusami⁶ when Mr. Ameer Ali

1. B.K. Mukherjea, op.cit., 4th ed., 157.

2. Per Sir Arthur Wilson, Jagadindra Nath v. Rani Hemanta Kumari (1903-04) 1A 203, 210.

3. Ram Rattan v. Bajrang Lal AIR 1978 SC 1393, 1396. Infra, p. 244. Mukherjea, op.cit., 4th ed., 201.

4. Prosunno Kumari Debya v. Golab Chand Baboo (1874-75) 2 IA 145, 151-152. This is the most important case for our topic on "alienation of debutter" in the 5th chapter of this thesis.

5. Per Lord Macnaghten, Ramanathan Chetti v. Murugappa Chetti (1905-06) 33 IA 139, 144.

6. (1920-21) 48 IA 302. Supra, p. 139.

pronounced for the Judicial Committee that

"when the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on the usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration."

Shebait is not a mere office, it is an amalgam of office and property.²

In Gnanasambanda Pandara Sannadi v. Velu Pandaram³ where the suit was brought by the respondent Velu to establish his right to the possession and management of the endowed property connected with a temple in Madras, Sir Richard Couch pronounced for the Privy Council that "there is no distinction between the office and the property of the endowment. The one is attached to the other..."⁴

It may be interjected that the Calcutta High Court in Sripati v. Khudiram⁵ a somewhat old case in which the dispute centred on the right of shebaiti of a deity, held that shebaiti was a mere office. Thus Chakravarti, J. observed that "the shebait has no right to the property but was merely an officer with the rights and limitations as are applicable to the guardian of a minor."⁶

But in so far as the legal meaning of shebaiti is concerned, unquestionably Angurbala v. Debabrata⁷ is the leading case.⁸ It has the especial merit of being decided by Indian judges of long experience of India. The dispute

1. (1920-21) 48 IA 302, 311.

2. Profulla Chorone v. Satya Chorone AIR 1979 SC 1682, 1686; Badri Nath v. Mst. Punna AIR 1979 SC 1314.

3. (1899-1900) 27 IA 69.

4. Ibid., p. 77.

5. AIR 1925 Cal 442.

6. Ibid., p. 445.

7. AIR 1951 SC 293 = (1951) SCR 1125.

8. "The leading case is now Angurbala Mullick v. Debabrata Mullick (1951) SCR 1125" - J.D.M. Derrett, Critique, 383.

between the parties centred on the issues¹ whether the plaintiff widow was entitled, after her husband's death, to shebaiti of the idol in question either solely or jointly with her stepson, the defendant of the case. B.K. Mukherjea, J. as he then was, pronounced for the Supreme Court that

"though a Shebait is a manager and not a trustee in the technical sense, it would not be correct to describe the Shebaitship as mere office. The Shebait has not only duties to discharge in connection with the endowment, but he has a beneficial interest in the debutter property. As the judicial Committee observed in the above case,² in almost all such endowments the shebait has a share in the usufruct of the debutter property which depends upon the terms of the grant or upon custom or usage. Even where no emoluments are attached to the office of Shebait, he enjoys some sort of right or interest in the endowed property which partially at least has the character of a proprietary right. Thus, in the conception of Shebaiti both the elements of office and property, of duties and personal interest, are mixed up and blended together, and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests Shebaitship with the character of proprietary rights and attaches to it the legal incidents of property."³

The proprietary element in the shebaiti was emphasized long before Angurbala's case⁴ and clearly shown in the Full Bench decision of the Calcutta High Court in Monohar Mukherji v. Bhupendra Nath⁵ where the suit was brought mainly to establish the title of shebaiti. Mukherji, J. pronounced for the Court that the right of a shebait "is none the less a kind of property, which Hindu law, as far as may be gathered, has never refused to recognise."⁶ The decision in Monohar Mukherji's case⁷ was approved by the Privy Council in both Ganesh Chunder v. Lal Behary⁸ and Bhabatarini v. Ashalata;⁹ while the former was concerned with the validity of certain provision relating to the succession of shebaits, the latter was connected

1. AIR 1951 SC 293, 294.

2. Vidya Varuthi v. Balusami AIR 1922 PC 123. Supra, p. 217.

3. AIR 1951 SC 293, 296.

4. Ibid.

5. ILR (1933) 60 Cal 452 (FB).

6. Ibid., p. 483.

7. ILR (1933) 60 Cal 452 (FB).

8. (1935-36) 63 IA, 448, 453.

9. (1942-43) 70 IA 57, 63.

with the devolution of shebaiti. In this regard it must be stressed that the decision in Angurbala v. Debabrata¹ was based on the decisions in the aforesaid three cases of the Privy Council and the Calcutta High Court and the Supreme Court, apart from Vidya Varuthi's case², specifically referred to the said three cases.³

Again the same learned judge emphasized the proprietary element of shebait in Kalipada v. Palani Bala⁴ in which "the controversy between the parties practically centres round one short point, namely, whether or not the plaintiff's suit is barred by limitation."⁵ His Lordship held that "Whatever might be said about the office of a trustee, which carries no beneficial interest with it, shebaitship, as is now well-settled, combines in it both the elements of office and property."⁶

In Commissioner of Hindu Religious Endowments v. Sri Lakshmindra Tirtha Swamiar, Shirur,⁷ the view that shebaiti was a property was reiterated and extended to the office of mahantship. Again in Raj Kali Kuer v. Ram Rattan⁸ applying the principle in Angurbala's case⁹ Jaganadhadas, J. observed for the Supreme Court that "On the same analogy as that of a 'shebaiti' right, the right of a hereditary priest or pujari in a temple must also amount to property where emoluments are attached to such an office."¹⁰

The importance of Angurbala's case¹¹ lies in the fact that it not only spelt out categorically that shebaiti was a property¹² but it also laid down the law on the facts of the case that it was a property within the meaning of the Hindu law of succession.¹³ It may be recalled that in

1. AIR 1951 SC 293.

2. AIR 1922 PC 123.

3. AIR 1951 SC 293, 296.

4. AIR 1953 SC 125.

5. Ibid., p. 126.

6. Ibid., p. 130.

7. AIR 1954 SC 282. Supra, p. 16.

8. AIR 1955 SC 493.

9. AIR 1951 SC 293.

10. AIR 1955 SC 493, 496.

11. AIR 1951 SC 293.

12. Ibid., p. 296.

13. Ibid., p. 298.

that case the main question to be decided by the Supreme Court was the question regarding the applicability of the Hindu Women's Right to Property Act, 1937 (Act 18 of 1937). The rule that shebaiti is a property,¹ it is a heritable property,² and partible³ as laid down in the case is a firmly established rule. Because of this view of shebaiti, because of the restriction of testamentary disposition of shebaiti⁴ and because of the effect on the Hindu Succession Act, 1956 (Act 30 of 1956) (allowing unlimited heirs to succeed to shebaiti) the issue of shebaiti has posed a great problem which we will be discussing at the end of this chapter.⁵

Section 2. CREATION OF SHEBAITI

In the conception of debutter the ideal personality of the deity as a juristic owner is linked with the natural personality of its manager or shebait⁶ who is in possession and the management of the debutter.⁷ As soon as the deity is installed shebaiti remains in the founder⁸ and if he does not appoint a manager to look after the services of the deity he is himself responsible for performing those services. It is his duty to see that the worship of the deity is performed.⁹

After the deity is installed, if a founder chooses himself as the shebait of the deity, he can appoint a shebait any time before his

1. Anath Bandhu v. Krishna Lal AIR 1979 Cal 168, 171.
2. Profulla Chorone v. Satya Choron AIR 1979 SC 1682, 1686, Badri Nath, AIR 1979 SC 1314 (above), Kalyan v. Rambir AIR 1980 NOC 123 (All).
3. It is obvious that shebaiti cannot be physically partitioned like a plot of land. But it is legally partible in the sense that heirs of equal degree can enjoy shebaiti by turn. See on this point Ram Rattan v. Bajrang Lal AIR 1978 SC 1393, 1396.
4. We will be discussing this issue under the topic of "Alienation of shebait" in sec. 4 of this chapter.
5. On this point see Derrett's Critique, 386-387.
6. B.K. Mukherjea, op.cit., 4th ed., 159.
7. Mayne's Hindu Law, op.cit., 11th ed., 929.
8. B.K. Mukherjea, op.cit., 4th ed., 205.
9. Derrett, IMHL, 498.

death.¹ If he does not exercise his power of appointing a manager before his death, the power can be exercised by his successors² in whom shebaiti becomes vested.³ In Pramatha Nath v. Pradhyumna Kumar⁴ referring to the decision in Rambrama Chatterjee v. Kedar Nath Chatterjee⁵ where the details about worship of Hindu family deity were given, Lord Shaw in his observation showed us precisely the way a shebaiti was created when his Lordship observed that

"The person founding a deity and becoming responsible for these deities is de facto and in common parlance called shebait. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or as in the case of Sudras, to which caste the parties belonged - by the appointment of a Brahmin priest to do so on his behalf. Or the founder any time before his death, or his successor likewise, may confer the office of shebait on another."⁶

The duty of a shebait is not that he himself should carry out the worship of the installed deity but his paramount duty is to see that worship is done. So if he does not want to do it himself he can delegate his duty to a pujari,⁷ a paid servant of the shebait,⁸ who has specialised in religious matters.

In so far as shebait is concerned there is no legal bar for a female to be a shebait⁹ and she is also entitled to a priestly office.¹⁰ In Raj Kali

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1. The same law was in force at least three centuries ago. See T. Mukherjee and J.C. Wright, "An Early Testamentary Document in Sanskrit" (1979) 42 (2) B.S.O.A.S. 297-320 where the authors discussed an old testamentary document made by the founder of a temple relating to succession to shebaiti.
 2. Pramatha Nath v. Pradhyumna (1924-25) 52 IA 245, 251.
 3. Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee (1888-89) 16 IA 137, 144. See below, p.251.
 4. (1924-25) 52 IA 245.
 5. (1922) 36 CLJ 478, 483.
 6. (1924-25) 52 IA 245, 251.
 7. Derrett, IMHL, 498.
 8. Kalimata Thakurani v. Jibandhan AIR 1962 SC 1329, 1333 where the suit was filed for the purpose of framing a scheme.
 9. Angurbala v. Debabrata AIR 1951 SC 293; Kalipada v. Palani Bala AIR 1953 SC 125, 130; Raj Kali Kuer v. Ram Rattan AIR 1955 SC 493, 496.
 10. Annaya Tantri v. Ammaka Hengsu AIR 1919 Mad 598 (FB). The majority of the judges (Sadasiva Aiyar J. dissenting) of the Full Bench held that a female was entitled to inherit a priestly office. The office in question in that case was that of an archaka, a hereditary priest - see on this point B.K. Mukherjee, op.cit., 4th ed., 223.

Kuer v. Ram Rattan¹ the question to be determined was whether the office of a pujari involving religious duties could not be performed by a female in person, and could then be discharged by a deputy. Jagannadhadas, J. spoke for the Supreme Court that "the usage of a female succeeding to a priestly office and getting the same performed through a competent deputy is one that has been fairly well recognised."² But it may be pointed out that in West Bengal in every Hindu family, Brahmin or not, daily worship of a deity or deities,³ whether or not formally installed through an endowment, is performed by both males and females and moreover, it is noticeable that it is the females who outnumber the males in such kind of worship.⁴

Even if a shebait might hold different beliefs from the founder, he cannot be removed from his shebaiti. In Iswar Radhakanta v Kshetra Ghosh⁵

1. AIR 1955 SC 493.

2. Ibid., p. 503.

3. "Hindu homes in Bengal are usually the homes of several deities as well. A prosperous, high-caste family may maintain a separate building within the house as a temple for its clan deity (Kuladevata), normally a form of Vishnu, in which images of Siva, Lakshmi, and perhaps other gods and goddesses also receive the daily ministrations of a Brahman domestic priest (purohita). In a less elaborate arrangement, a room in the highest part of the house is set aside as 'gods' room' (thakur ghar), where members of the family as well as the domestic priest may worship the deities. An ordinary household of agriculturalists might have only a deep niche in the thick mud wall of the house where pottery vessels of Lakshmi, Ganesha, and, perhaps, a small brass Siva in the form of a linga receive offerings of water, vermilion and flowers, and an evening honorific display of light from the mistress of the house. A less well-to-do home may contain one or two polychrome pictures of deities hung on the wall - but these too are gods and receive some kind of regular service; only the very poorest have none of these representations of the gods in them, even those have one shrine in common with those of the wealthiest and highest castes: this is the tulasī mancā, or 'pedestal of the sacred basil plant'" - R.W. Nicholas, "Understanding a Hindu Temple in Begal" in A.C. Mayer (ed.) Culture and Morality, Oxford University Press, New Delhi, 1981, 174-190, 174-175. Though Nicholas has omitted to point out the fact that the homes of the very poor Hindus have at least one or two old or new Bengali calendars having in them the pictures of the deity or deities hung on the wall, it must be admitted that he has given a good account of the worship of deities in Bengali Hindu homes in general.

4. Personal experience of the writer suggests so.

5. AIR 1949 Cal 253.

the shebait was a convert to Arya Samaj which does not believe in idol worship. The Calcutta High Court had to deal with the issue whether personal performance of rituals connected with idol worship was essential to the succession of shebaiti. K.C. Chunder, J. delivering the judgement for the Court held that "the defendant respondent has the right to remain the shebait, though he must have the duties connected with the preparation of the worship and actual worship performed by a competent Brahmin..."¹

Sometimes a founder may (very sensibly) appoint trustees for the endowment in whom the endowed property vests for purposes of management and investment and also a shebait for the purpose of carrying out the purpose of the debutter. In Raikishori Dassi v. Official Trustee² the endowed properties vested in the trustees for their management and investment only and they were directed by the testator's will to pay over a fraction of the income to the shebait for the purpose of carrying out the worship of the deity. Though the High Court refused to accept the said direction as valid, it ruled that the endowment was the absolute debutter property of the deity in question and it "is entitled to the entire income thereof".³ Moreover, in so far as the management and the income of the endowed property are concerned, the trustees are accountable to shebaiti but the latter not the former were responsible for the worship of the deity.

The
/ creation of shebaiti is related to the conception of debutter, but it is not necessary to the worship of an idol. The worship of an idol may be performed and is performed by many Hindus without creating any endowments, so without appointing shebaiti.

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1. AIR 1949 Cal 253, 254. By statute in Kerala the managers of a particular public temple must take an oath that they believe in idol worship. See sec. 4, especially the implication of sec. 4(2)(1) of the Guruvayoor Devaswom Act, 1978 (Kerala Act 14 of 1978). Below, Appendix II C.
 2. AIR 1960 Cal 235.
 3. Per G.K. Mitter, J., ibid., p. 241.

Section 3. ABSOLUTE AND LIMITED SHEBAITI

Shebaitship being property¹ it can be disposed of by the founder whether absolutely or for a limited period.² If the founder disposes of it absolutely it will be a case of hereditary shebaiti³ and a shebaiti cannot be heritable unless the shebait has a personal interest in it.⁴ If it is heritable then the ruling in Tagore v. Tagore⁵ that a Hindu cannot create a line of succession which is not known to Hindu law, will apply.⁶ In such a case if the grantee dies the heirs of the grantee, not those of the founder, will be entitled to shebaiti.⁷

In Tripurari Pal v. Jagat Tarini Dasi⁸ the dispute centred on the claims over the shebaiti of an endowed property. In that case the testator laid down in his will that after his death his son, Mukunda, would be the shebait but if Mukunda remained a minor when he died, his wife, Brajamati would be

1. Angurbala v. Debabrata AIR 1951 SC 293, 296. Supra, p. 218; Ram Rattan v. Bajrang Lal AIR 1978 SC 1393, 1397. Infra, p. 244; Prafulla Chorone v. Satya Chorone AIR 1979 SC 1682, 1686. Infra, p. 252.
2. Panchanan v. Surendra (1929) 50 CLJ 382. In that case the testator laid down in the will that his sons would be shebaiti for their lifetime, i.e. for a limited period. Bhabatarini v. Ashalata (1942-43) IA 57: In that case the settlor provided in the deed that after his and his wife's death his son would be shebait for his lifetime.
3. B.K. Mukherjea, op.cit., 4th ed., 209.
4. Padmabati v. Biswanath AIR 1976 Cal 344, 346. In that case, after judging the background of the case and reading the scheme in question the High Court of Calcutta held that the settlor did not intend that shebaiti should have pecuniary interest in the debutter.
5. (1872-73) IA Sup. vol. 47.
6. Gnanasambanda v. Velu (1899-1900) 27 IA 69, 78. Infra, p. 230. In that case (at p. 78) Sir Richard Couch pronounced for the Privy Council that "the ruling in Tagore v. Tagore is applicable to the hereditary office and endowment as well as to other immovable property". The view was relied on in Monohar Mukherji v. Bhupendra Nath Mukherji ILR (1933) 60 Cal 452 the decision of which was approved by the Privy Council in Ganesh Chunder v. Lal Behary (1935-36) 63 IA 448. On the issue in question see below, sec. 5 of this chapter.
7. Tripurari Pal v. Jagat Tarini Dasi (1912-13) 40 IA 37; Kunjamani v. Nikunja (1915) 22 CLJ 404.
8. (1912-13) 40 IA 37.

the shebait until Mukunda attained majority. The settlor also made provision that if Mukunda too died after his death Brajamati, mother of Mukunda, would again take over shebaiti and after her death, her two daughters would be shebaites. Now, after the death of the testator, Brajamati acted as a shebait, because Mukunda was still a minor. Mukunda took over shebaiti after he attained majority. But he died a premature death. Brajamati reassumed shebaiti. The minor son of Mukunda through his mother sued Brajamati and her two daughters for a declaration that he was the sole shebait of the debutter in question. Overruling the decision of the High Court, the Privy Council held that "There is, in their Lordships' view, an absolute gift of the shebaiti to the son Mukunda Murari on his attaining majority and it is not cut down, as far as they can see, by anything that follows."¹

But if the shebaiti of an endowment is given to a grantee for a limited period, e.g. for his lifetime, the heirs of the founder but not those of the grantee will be shebaites after the death of the grantee. In Bhabatarini v. Ashalata² the Judicial Committee laid down the rule that if the founder grants shebaiti to a person for a limited period, the grant does not terminate the founder's or his heirs' interest in the shebaiti. On the expiry of the limited period the shebaiti will revert to the founder or to his heirs. The relevant facts of the case are that the founder, one Sital, made provision in the deed of dedication that "Sital and his wife Rajlakshmi should be the first shebaites, and that on the death of Sital (who survived his wife) Panchanan should be shebait in his stead...Upon the death of Panchanan in 1932 the specific provisions validly made by Sital as founder with respect to the succession to the office of shebait became exhausted."³

1. Per Lord Macnaughten, (1912-13) 40 IA 37, 40.

2. (1942-43) 70 IA 57.

3. Ibid., p. 59.

Sital died leaving a daughter, Bhabatarini and Panchanan died leaving his wife, Ashmantara¹ and three daughters. Thus Sir George Rankin pronounced for the Privy Council that

"It must now be taken that shebaiti is property, that it is not a catena of successive life estates (Gnanasambanda's case) but is heritable - heritable ^{property} which in the first instance is vested in the founder. It must further be accepted that the founder may direct that a designated person should hold the office during that person's life, either immediately or on the death of a previous holder, and that such directions subject to the relevant conditions as to perpetuity, whatever these may be - will be good although it carries no right to the heirs of the grantee and does not amount to a complete disposal of the shebaiti.

"If then, on the death of the grantee the shebaiti goes to the founder or his heirs, this is because the right of the founder is heritable and he has not completely disposed of the interest which he has therein. It is impossible to represent this as spes successionis. It is a right in the founder and his heirs. It is the same estate of inheritance as the founder held at the date of the grant. The grant did not exhaust it or terminate the founder's interest. On the death of the grantee the shebaiti "reverts" because the heritable interest of the founder has ceased to be qualified by the grant."²

In this connection it may be pointed out that the question as to "who should be the first takers after those specifically nominated to the office by the founder"³ was not fully settled until it was finally confirmed by the decision of the present case. In the original side of the High Court when the case came up the trial judge (Khundkar, J.), accepting the view of Kunjamani v. Nikunja,⁴ held that after the death of Panchanan, Bhabatarini, daughter of the founder, being the nearest surviving relative of the founder would be entitled to shebaiti. In Kunjamani v. Nikunja⁵ the founder died leaving a widow and six sons. His nominees to be shebaiti after his death were his widow and two sons successively and he did not give any other direction. When all the nominated shebaiti died it was held that "the office vests in persons who at the time constitute the heirs of the founder,

1. The present case first came up to the Calcutta High Court in the original side in Bhabatarini v. Ashmantara AIR 1938 Cal 490.

2. (1942-43) 70 IA 57, 66-67.

3. Ibid., p. 60.

4. (1915) 22 CLJ 404.

5. Ibid.

provided the last shebait has not taken it absolutely..."¹ So the then four surviving sons of the founder were the heirs of the founder. But on appeal the view of Khundkar, J. as expressed in Bhabatarini v Ashmantara² was not accepted by Derbyshire, C.J. and B.K. Mukherjea, J. as he then was, of the Calcutta High Court. In the judgement of the Appellate Bench, B.K. Mukherjea, J. argued that as shebaiti was not granted to Panchanan absolutely, the residuary right was still in the founder, Sital and his heirs. But Panchanan being the sole heir of the founder both the residuary and the limited rights merged in him. "His position therefore was that of an absolute shebaiti, his heirs and not the heirs of the founder would be entitled to succeed as shebaiti."³ The decision of the Appellate Bench was affirmed by the Privy Council but the Judicial Committee added that as there was no direction regarding devolution of shebaiti in the event of the death of the last nominee, the residuary right remained in the founder from the beginning and it devolved as a species of heritable property following "the line of inheritance from the founder".⁴

The two issues of absolute and limited shebaiti are really the issues concerning the subject of devolution which will be dealt with in detail in section 5 of this chapter.

Section 4. ALIENATION OF SHEBAITI

Though shebaiti is heritable,⁵ it cannot be transferred like other properties freely.⁶ Shebaiti being an amalgam of elements of both office and property,⁷ the concept of property, in its application, is not to be

1. Per Sir Asutosh Mookerjee, J., (1915) 22 CLJ, 404, 408.

2. AIR 1938 Cal 490.

3. Mukherjea, op.cit., 4th ed., 211.

4. Per Sir George Rankin, Bhabatarini v. Ashalata (1942-43) 70 IA 57, 60. See also Mukherjea, op.cit., 4th ed., 212.

5. Monohar v. Bhupendra Nath AIR 1932 Cal 791 (FB); Bhabatarini v. Ashalata AIR 1943 PC 89; Angurbala v. Debabarata AIR 1951 SC 293.

6. B.K. Mukherjea, op.cit., 3rd ed., 1970, 178 = 4th ed. 205.

7. Gnanasambanda v. Velu (1899-1900) 27 IA 69. In that case,

understood in its unqualified sense. It is a special kind of property,¹ alienability of which is very restricted and is not permitted except under special circumstances. In the vast majority of cases the Court prevents alienation for value.² This is of great interest since it proves the State's interest in the regularity and authenticity of the endowment and its traditional function - while the Hindu notion that secular interests are to be preserved behind a screen of religion is given less weight.

In Rajah Vurmah v. Ravi Vurmah,³ some important pronouncements on the subject of alienation of shebaiti were made by the Judicial Committee. In that case, the appellant Rajah paid a certain amount to the four managers (urallars) of a religious foundation, a pagoda and its dependent institutions, for satisfaction of their debts and also an extra sum personally to them. So far as the pagoda and its dependent institutions are concerned, the managers transferred all their rights to the Rajah under an assignment. Though the Rajah gained possession of landed properties, he could not take possession of certain jewellery belonging to the pagoda, and as a result, he instituted this suit. The main issue to be decided by the Priy Council was whether the managers were entitled to assign the conduct of worship and to transfer their right to manage property of the endowment to the Rajah of Cherakel Kovilagam. The Judicial Committee held that the suit must fail as the assignment was void in law. Such assignment of religious office for pecuniary benefit was held to go against public policy and could not be countenanced even on the score of custom. Sir James Colville who delivered the judgement of the Board observed that

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the Judicial Committee held (at p. 77) that "there is no distinction between the office and property of the endowment. The one is attached to the other."

1. Sovabati Dassi v. Kashinath, AIR 1972 Cal 95, 100.
2. But the right to recover shebaiti from adverse possession can be barred by limitation. On this point see Lakshmana v. Vaidyanatha IIR (1956) Mad 1144.
3. (1876-77) 4 IA 76.

"The first question is, whether independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition; principle and reason seem to be strongly opposed to such a power, and particularly to such an exercise of it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together; he may also have considered it essential that those four persons should be the heads of particular families, in a particular district, open to the public opinion of that district; and having that sort of family interest in the maintenance of this religious worship would increase its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust to a single individual, who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken."¹

The main objection was thus to the alienee and the terms of the alienation.

The rule as laid down in Rajah Vurmah's case,² was reasserted in Gnanasambanda v. Velu.³ In that case, the hereditary trustees sold their right of management of a religious endowment and transferred the endowed property. It was held by the Judicial Committee that in the absence of a custom, the sale of the right of management and that of the endowed property are not merely voidable but strictly null and void.⁴

The Judicial Committee have never questioned the principles enunciated in the aforesaid two cases. Any alienation by a shebait in contravention of the law, as laid down in those cases, is void,⁵ and may be declared void at the instance even of the alienor.⁶ The post-Independence Courts in India have loyally persisted in this view of Indian law.

The Supreme Court has not deviated. In Kali Kinkor v. Panna Banerjee,⁷

1. (1876-77) 4 IA 76, 81.

2. Ibid.

3. (1899-1900) 27 IA 69.

4. Ibid., p. 76.

5. Narayanan v. Lakshmanan AIR 1915 Mad 1196; Nagendra v. Rabindra, AIR 1926 Cal 490.

6. Jugget Mohini Dossee v. Sokheemoney Dossee (1871) 17 WR 41 (PC).

7. AIR 1974 SC 1932.

a co-shebait purported to transfer her share in shebaiti to a stranger by a deed of sale. The Supreme Court confirming the decision of the Calcutta High Court¹ held that the transfer of shebaiti by sale in such circumstances "is void in its inception".²

In Shrimati Mallika Dasi v. Ratanmani,³ the main point for consideration was whether pala or turn of worship was transferable by way of mortgage. Banerjee, J. referring to the cases⁴ of both the Privy Council and the different High Courts observed: "It has been held in a uniform current of decisions, both in this Court and in the High Courts of Bombay and Madras, that a priestly office with emoluments attached to it is inalienable."⁵

In Mahamaya v. Haridas,⁶ the main issue to be decided was whether palas or turns of worship of the Kalighat temple were transferable by way of mortgage on the footing of custom in the limited market of hereditary shebaiti by blood and marriage, and the High Court of Calcutta held that according to custom a pala of the Kalighat temple was transferable for value in the limited circle of shebaiti by blood or marriage. In that case, the main issue was transferability of palas and Sir Asutosh Mookerjee, J. made important observations on the issue of alienability of shebaiti. His Lordship, citing many cases⁷ on the subject, observed that "in the absence of a custom

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1. Panna Bannerjee v. Kali Kinkor, AIR 1974 Cal 126, see below, this section.
 2. Per Ray, C.J., AIR 1974 SC 1932, 1936. 3. (1897) 1 CWN 493.
 4. Juggernath v. Kishen Pershad (1867) 7 WR 226; Drobo Misser v. Srineebash Misser (1870) 14 WR 409; Kalee Churn v. Bungshi Mohan (1871) 15 WR 339; Rajah Vurmah v. Ravi Vurmah (1876-77) 4 IA 76; Mancharam v. Pranshankar (1882) 6 Bom 298; Kuppa v. Dorasami ILR (1882) 6 Mad 76.
 5. (1896-97) 1 CWN 493, 496.
 6. AIR 1915 Cal 161. In Hemanta Kumar v. Prafulla Kumar AIR 1957 Cal 685, the principle in the Mahamaya case was extended and it was held in that case that poojaris or hereditary priests of the Kalighat temple would also be within the competent class of transferees of palas under a custom.
 7. For example, Drobo Misser v. Srineebash Misser (1870) 14 WR 409; Ukoor Doss v. Chunder Sekur Doss (1865) 3 WR 152; Kalee Churn v. Bungshi Mohun (1871) 15 WR 339; Rajah Vurmah v. Ravi Vurmah (1876-77) 4 IA 76; Rama Varma v. Raman Nayar ILR (1882) 5 Mad 89; Durga Bibi v. Chanchal Ram ILR (1882) 5 All 81; Kuppa v. Dorassami ILR (1882) 6 Mad 76; Kannan v. Nilakandan ILR (1884) 7 Mad 337; Narayana v. Ranga ILR (1892) 15 Mad 183; Subbarayadu v.

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or usage to the contrary or any term to that effect in the deed of the endowment, a religious trust or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment, cannot be alienated by the holder."¹ This view of Sir Asutosh Mookerjee, J. was the reassertion of the law as laid down by the Judicial Committee in Raja Vurmah's case,² and the observation has often since been quoted with approval in different decisions³ of the Calcutta High Court.

But even apart from the consideration of custom, the High Courts in India have recognised some exceptions⁴ to the rule that shebaiti is inalienable. One view is that a transfer of shebaiti is valid if it is made in favour of a person standing in the line of succession.⁵ Again there is authority for the proposition that an alienation of shebaiti is valid only when it is made in favour of a sole and immediate heir.⁶ Another view is that shebaiti is alienable to an immediate or sole heir where the alienation is made by way of renunciation or abdication.⁷ On the question of transfer of shebaiti,

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Kotayya ILR (1892) 15 Mad 389; Rangasami v. Ranga ILR (1893) 16 Mad 146; Trimbak v. Lakshman ILR (1895) 20 Bom 495; Alagappa v. Sivaramasundara ILR (1896) 19 Mad 211; Shrimati Mallika v. Ratanmani (1897) 1 CWN 493; Rajaram v. Ganesh ILR (1898) 23 Bom 131; Gnanasambandhav. Velu. (1899-1900) 27 IA 69; Lakshmanaswami Naidu v. Rangamma ILR (1903) 26 Mad 31; Ramanathan v. Murugappa ILR (1904) 27 Mad 192; Rajeshwar v. Gopeshwar ILR (1907) 34 Cal 828.

1. AIR 1915 Cal 161, 164.
2. (1876-77) 4 IA 76.
3. Nagendra v. Rabindra, AIR 1926 Cal 490, 497; Manohar v. Bhupendra, AIR 1932 Cal 791 (FB) 807; Bameswar v. Anath AIR 1951 Cal 490, 495.
4. Profulla Chorone v. Satya Chorone AIR 1979 SC 1682, 1687.
5. Sitaram Bhat v. Sitaram Ganesh (1869) 6 BHCR 250, 253; Mancharam v. Pranshankar ILR (1882) 6 Bom 298, 300; Annasami v. Ramakrishna ILR (1901) 24 Mad. 219, 225; Nirad Mohini v. Shibadas ILR (1909) 36 Cal 975, 977; Prayag v. Govindacharlu AIR 1935 Mad 220, 226; Official Receiver v. Jogamaya (1946) 50 CWN 272, 279; Nandlal v. Kesarlal AIR 1975 Raj 226.
6. Narayana v. Ranga ILR (1892) 15 Mad 183, 186; Muthukumaraswamia v. Subbaraya AIR 1931 Mad 505, 508.
7. Nagendra v. Rabindra AIR 1926 Cal 490, 499; Bameswar v. Anath AIR 1951 Cal 490, 495.

there is a controversial view according to which an alienation of shebaiti can be held valid on the basis of the doctrine of necessity or benefit of the deity.¹

The rule that the office of a shebait is transferable or alienable in favour of a person standing in the line of succession to the office has been laid down in Mancharam v. Pranshankar.² In that case, the appellant's (Mancharam's) predeceased brother's son bequeathed his right of worship and that of receiving a share of offerings to his sister's son, the plaintiff Pranshankar. Melville, J. who delivered the judgement of the case, observed that

"if the alienation of priestly office is open to objection only on the grounds that it would be contrary to the founder's intention that the office should pass out of his family, and that it would be incompatible with the due performance of the duties of the office that it should be held by a person of a different religion or caste, then (in the absence of any restriction to a particular class of heirs, imposed either by the founder or by usage) there would appear to be no reason why an alienation should not be upheld, which is made in favour of any person standing in the line of succession, and not disqualified by any personal unfitness."³

The view that shebaiti is alienable only to a sole and immediate heir is generally associated with the view of the Madras High Court, as expressed in Narayana v. Ranga.⁴ In that case, the right to the office of the hereditary pujari was transferred to the plaintiff's father by his uncle. On the finding that the plaintiff's father was not the sole heir, the Court held that the transfer of the office of the pujari was invalid. So Mukherjea observed that "opinion of the Madras High Court definitely is that in the absence of a special usage, the alienation of a religious office would not be valid, if made in favour of any person other than the sole and immediate

1. Khetter Chunder v. Hari Das ILR (1890) 17 Cal 557; Nirad v. Shibadas ILR (1909) 36 Cal 975; Nirmal Chandra v. Jyoti Prosad AIR 1941 Cal 562; Sovabati v. Kashinath AIR 1972 Cal 95; Jagannath v. Byomkesh AIR 1973 Cal 397.

2. ILR (1882) 6 Bom 298.

3. Ibid., p. 301.

4. ILR (1892) 15 Mad 183.

heir of the transferor."¹ But the view of the Madras High Court is by no means settled because of the decisions in Prayag v. Govindacharulu,² and Annasami v. Ramakrishna,³ which held that an alienation of shebaiti could be held valid if made in favour of a person standing in the line of succession. Referring to earlier decisions of the same High Court including the decision in Narayana v. Ranga⁴ the Madras High Court in Prayag's case⁵ pointed out that the High Court in those cases refused only to apply the principle in Mancharam v. Pranshankar⁶ to transfers for consideration or value or to transfers to strangers.

Again, B.K. Mukherjea places on the same footing the view of alienation of shebaiti in the form of renunciation, to a sole and immediate heir, as expressed by Page, J. in Nagendra Nath v. Rabindra,⁷ where his Lordship made an elaborate treatment on the subject of alienation of shebaiti, and the opinion of the Madras High Court on the question of transfer or alienation of shebaiti when he said that

"A shebait like a trustee cannot delegate his duties to another person, but he is not bound to accept his office, and if he renounces his duties which he always can, then even if the renunciation be in the form of a transfer in favour of the next heir, it can be held valid in law. This is the view of the Madras High Court, and exactly the view taken by Mr. Justice Page in Nagendra Nath v. Rabindra."⁸

It is submitted that there is a difference in views as expressed in cases⁹ cited by B.K. Mukherjea¹⁰ and as expressed by Page, J. in Nagendra's case.¹¹ The Madras High Court would hold a transfer of religious office as valid if the transferee was the sole and immediate heir, even if that transfer

1. B.K. Mukherjea, op.cit., 3rd ed., 182.

2. AIR 1935 Mad 220.

3. ILR (1901) 24 Mad 219.

4. ILR (1892) 15 Mad 183.

5. AIR 1935 Mad 220.

6. ILR (1882) 6 Bom 298.

7. AIR 1926 Cal 490.

8. B.K. Mukherjea, op.cit., 3rd ed., 183-184 = 4th ed., 235-236.

9. Narayana v. Ranga ILR (1892) 15 Mad 183; Muthukumaraswamia v. Subbaraya AIR 1931 Mad 505.

10. B.K. Mukherjea, op.cit., 3rd ed., 182.

11. AIR 1926 Cal 490.

was made under an assignment. Thus, in Narayana v. Ranga,¹ the religious office was transferred to the plaintiff's father under an assignment, and the transfer "was evidenced by a muktiarnama filed as an exhibit A". The High Court of Madras would have held the transfer as being valid but for the reason that he was not the sole and immediate heir to the alienor! But Page, J. shared the view that the office of a shebait could not pass under an assignment even to a sole and immediate heir. Thus his Lordship observed that

"if it be assumed that a shebait is competent to abdicate from his office, in my opinion, such an act would operate to transfer the office to the persons entitled thereto as reversioners under the foundation or in default of any directions by the founder or of custom, according to the principles of the Common Law of India. The office would not pass to the assignee under or by virtue of any assignment of his office by the abdicating shebait, whether it purported to be in favour of the sole immediate heir or any other person, for every such assignment, in my opinion, is wholly void and inoperative."²

The view of Page, J. sounds more plausible on the subject of alienability of shebaiti than the opinion of the Madras High Court, as expressed in Narayana v. Ranga³ and Muthukumaraswamia v. Subbaraya.⁴

Next, it seems that the authority for the proposition that an alienation of shebaiti is valid if it is made on the basis of doctrine of necessity or benefit to the deity, found its expression first in the important and original decision in Khetter Chunder v. Hari Das.⁵ In that case, shebaits of a family endowment being unable to carry on the worship of the idol with the profits of the debutter, made over the idol together with the endowed property to the plaintiff's predecessors. Since then the plaintiff's predecessors and after them, the plaintiff had been holding the endowed land and performing the worship of the deity. Though the Courts below

1. ILR (1892) 15 Mad 183.

2. AIR 1926 Cal 490, 499. My emphasis.

3. ILR (1892) 15 Mad 183.

4. AIR 1931 Mad 505.

5. ILR (1890) 17 Cal 557.

ruled that the plaintiff's predecessors acquired the valid right as shebait of the endowment, the High Court, without giving any importance to the finding of the lower Courts, held the transfer of shebaiti to the plaintiff's forefathers as valid mainly for the reason that it was for the benefit of the deity. The High Court purported to rely for its decision on the two pronouncements of the Privy Council in Prosunno Kumari v. Golab Chand¹ and Konwur Doorga Nath v. Ram Chunder.²

It should be noted that the Privy Council cases were concerned with the question of the alienation of debutter. In Prosunno Kumari's case³, the respondent obtained two decrees against the shebait of an idol for the bonds made for repayment of money which was alleged to have been borrowed to be spent for the expenses of the temple and the service of the idol. The appellants as succeeding shebait to the judgement debtor instituted the suit to set aside the said decrees. The Judicial Committee held that the decrees were binding on the succeeding shebait. In Konwur Doorga Nath's case⁴ the appellant instituted the suit to set aside certain alienations of a "mehal" (estate) made by his grandmother, on the ground that the "mehal" was debutter. The Judicial Committee held that the estate was not debutter and also held that according to the admissions in the deeds, the sales were justifiable, even if the property were dedicated to the worship of the idol.

It is to be observed that the aforesaid two cases had nothing to do with the alienation of shebaiti. They were concerned with the question of alienation of debutter and no rule enunciated in those cases would be immediately applicable to Khetter Chunder's case,⁵ because of its different subject-matter. The rule of necessity as developed and applied in the Privy Council

1. (1875) 2 IA 145. See above, sec. 1a of the 5th Chapter.

2. (1876) 4 IA 52.

3. (1875) 2 IA 145.

4. (1876) 4 IA 52.

5. ILR (1890) 17 Cal 557.

cases on the basis of the famous Hunoomanpersaud's case,¹ is to apply to the corpus of debutter or to the estate or property of the deity. The observation in Prosunno Kumari's case,² as made by the Judicial Committee and relied on by Khetter Chunder's case³ is to the effect that a shebait is entitled to alienate debutter lands only for the service of the deity, e.g. for the benefit and preservation of the endowed properties. It is submitted that this observation is related to and meant for the preservation of debutter and for the service of the idol, and the rule of necessity or of benefit of the deity had been laid down by the Judicial Committee to be applied to the cases where the subject-matter is the alienation of debutter for the benefit of the idol, though (admittedly) transfers of debutter lands are thereby authorised. Any attempt to apply the rule in cases of differing subject matter will amount to a misapplication of the law laid down by the Judicial Committee. In this case (Khetter Chunder's case)⁴ the rule was wrongly applied, because the issue there was the alienation of the shebaiti, not the debutter.

Again, the statement of the Judicial Committee as quoted in Khetter Chunder's case⁵ judgement is that "the consensus of the whole family might give the estate another direction".⁶ It is regretted that the sentence does

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1. (1856) 6 MIA 393. "The shebait, or all the shebaites together where there are more than one, have the power...to charge mortgage, or sell the property of the idol, or to dispose of its income, for the necessity of the idol, for example for its worship and for the repairs of the temple, or for the benefit of the idol's estate. The rule in Hunoomanpersaud's case...applies here also, and a third party dealing in good faith with the shebait after due inquiry into the necessity pressing upon the idol, is protected against suits on behalf of the idol" - Derrett, IMHL, 501. Again, B.K. Mukherjea observes (at pp. 277-278) on the application of the rule in Hunoomanpersaud's case, (1856 6 MIA 393), on Hindu religious endowments that "The transaction in Hunoomanpersaud's case was one by way of mortgage or charge for money received as loan, but the same principle applies to other forms of alienation like sale or permanent lease. No sale or mortgage of the debutter property by the shebait would be binding on the deity unless it is supported by legal necessity or benefit to the idol" - op.cit., 4th ed..
 2. (1875) 2 IA 145.
 3. ILR (1890) 17 Cal 557.
 4. Ibid.
 5. Ibid.
 6. (1876) 4 IA 52, 58. The issue has been dealt with in detail in sec. 5(b) of the 3rd chapter of this thesis.

not reveal the whole truth, and it must be read along with the next sentence of the judgement of the Privy Council case (Konwur Doorga Nath's case)¹ when it says that "No question however, of that kind arises in the present case", which operates as an admission by the Judicial Committee that this observation obiter, as quoted in Khetter Chunder's case,² was not called for to decide any issue of the Privy Council case. Moreover, it was a case involving the issue of alienation of endowed property. The High Court, in this case, not only misapplied a rule but also did not pay attention to the correct ruling of the lower Appellate Court which rightly decided that "even if the deed of gift was invalid, the plaintiffs had acquired a title by twelve years' possession."³ On this finding of the lower Court alone, the High Court could have dismissed the appeal, and the obiter ruling was embarrassing as well as unsound.

In Rajeshwar v. Gopeshwar⁴ the main point for consideration was whether hereditary shebaiti could be transferred by will. The decision of the High Court was in the negative. Though no necessity or benefit of the deity was made out by the evidence in that case, Mitra, J. one of the Bench of three judges, without citing any authority, had made a very short observation that a shebait "had no power to alienate except for necessity or clear benefit to the Thakur".⁵ B.K. Mukherjea rightly pointed out that much importance could not be attached to an incidental observation⁶ of Mitra, J. As the observation of Mitra, J. is irrelevant to the facts of the case, it cannot be cited as authority for the proposition of law that an alienation of shebaiti as distinct from alienation of debutter lands is justified on the ground of necessity or benefit to the deity.

1. (1876) 4 IA 52, 58.

2. ILR (1890) 17 Cal 557.

3. Ibid., p. 559.

4. ILR (1908) 35 Cal 226.

5. Ibid., p. 321.

6. B.K. Mukherjea, op.cit., 3rd ed., 186.

The recent decisions of the Calcutta High Court on the subject are conflicting. Observations in some cases¹ suggest that shebaiti can be alienated on the basis of necessity or benefit of the deity. But in Nemai v. Banshidhar,² the High Court of Calcutta relying on the decisions in Iswar Lakshi Durga v. Surendra,³ and Nagendra v. Rabindra,⁴ refused to allow transfer of pala to the defendant by a deed of gift in spite of the finding of the Courts below "that there was absolute necessity for such a transfer as the plaintiff under the circumstances was not in a position to go on with seva puja and the transfer was in favour of a person who was in the line of shebaiti."⁵

In Panna Banerjee v. Kali Kinkor,⁶ the main issues were whether a part of a temple and a share of a shebaiti right as alienated for a financial consideration were valid. The Calcutta High Court held that

"on an analysis of judicial opinion, there can hardly be any doubt that a shebaiti, even assuming that his temporal and spiritual rights, duties and obligations can be separated, cannot be sold even for legal necessity."⁷

The controversy regarding the question whether shebaiti can be alienated on the ground of necessity or benefit of the deity is not yet settled. A Supreme Court decision or at least a Full Bench decision is called for to resolve the dispute and the decision should take into consideration the view of Page, J. to the effect that the doctrine of necessity or benefit to the deity is applicable to the case of a transfer of the debutter lands only

1. Nirmal Chandra v. Jyoti Prosad, AIR 1938 Cal 709; Sovabati v. Kashinath, AIR 1972 Cal 195; Jagannath v. Byomkesh, AIR 1973 Cal 397.

2. AIR 1974 Cal 333.

3. (1940-41) 45 CWN 665.

4. AIR 1926 Cal 490.

5. AIR 1974 Cal 333, 334.

6. AIR 1974 Cal 126.

7. Ibid., p. 135.

and it does not extend to the case of a transfer of an alienation of an office of a shebait, as expressed in Nagendra v. Rabindra.¹ The merit of Page, J.'s view is that if the doctrine is allowed to extend to alienation of shebaiti as well then the shebait for the time being may, with some excuse, invoke the doctrine to bargain his office with any heir whether sole immediate heir or not for some pecuniary consideration. But if he *may only renounce* his office, there will not be any scope for him to bargain with his office. In that case, his Lordship observed that

"the rule of necessity extends only to an alienation of the temporalities of the idol. It does not, and in my opinion, it cannot be made to apply to any alienation of spiritual rights and duties, the fulfilment of which is the primary function of a shebait. To apply such a rule to the spiritual duties of a shebait would be to contravene a fundamental principle of the Hindu law, and to violate the religious instincts of all orthodox Hindus. Indeed, in the nature of things there can be no necessity for a voluntary transfer of the spiritual duties of a shebait, Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami,² and the doctrine that a shebait at his own will and pleasure is at liberty to alter the line of shebaiti on the ground that to do so will be 'for the benefit of the deity', in my opinion, offends against the Common Law of India, and is in conflict with the uniform rulings of the Judicial Committee of the Privy Council."³

Pala or Osra

Next, where there is more than one shebait, the shebaiti jointly are entitled to shebaiti. The reasons which are applicable to the entitlement of one of the several owners to the partition of a joint property are also to be applied in the case of a joint right of performing the worship of an idol. The joint owners are entitled (where they cannot agree) to a decree for the performance of worship by turn.⁴ As the partition of shebaiti "cannot be effected by metes and bounds, the only way of effecting it is by fixing turns."⁵ Hereditary religious offices were indivisible according to

1. AIR 1926 Cal 490.

2. ILR (1903) 27 Mad 435.

3. AIR 1926 Cal 490, 501-502.

4. Mitta Kunth v. Neeranjana (1875) 14 BLR 166.

5. Per Deoki Nandan, J., Nagarwali Devi v. Girjapati Tiwari AIR 1982 All 80, 82.

old Hindu law, but modern Hindu law sanctions partition of such an office by means of performing the duties of the office by different shebait by turns.

"Hereditary offices, whether religious or secular, are no doubt treated by the Hindu text writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property by means of a performance of the duties of the office and the enjoyment of the emoluments by the co-partners in rotation."

Moreover, shebait is entitled to make their own arrangements without the help of the Court, for performing their religious duties in such a way as is "conducive to the due and orderly execution of the office."² But in the eyes of the law, shebait remains one body and the deity is represented by all of them collectively. None of them can be said to represent the deity in part or to have any interest in a fractional share of the debutter.³ The performing of religious duties by several shebait in rotation is known as pala⁴ in West Bengal. Shebait is partible.⁵ "There is also no question that though probably religious offices were originally indivisible, they are now deemed partible."⁶ Pala is a divided or partitioned right⁷ of shebait of one shebait where shebait of a religious foundation is vested in several shebait. It is called osra in North India.⁸

However, in this context it may be pointed out that a serious controversy centred round the question whether a pala or osra was an interest in immovable property.⁹

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1. Per Melville, J., Mancharam v. Pranshankar ILR (1822) 6 Bom 298, 299.
 2. Per Lord Macnaghten, Ramanathan v. Murugappa (1906) 33 IA 139, 144. See also Alasinga v. Venkatasudarsana (1936) 70 MLJ 424.
 3. Iswar Lakshi Durga v. Surendra (1940-41) 45 CWN 665.
 4. Jagannath v. Byomkesh AIR 1973 Cal 397, 398.
 5. Ram Rattan v. Bajrang Lal AIR 1978 SC 1393, 1396, see below, this section.
 6. Per Sir Asutosh Mookerjee, J., Mahamaya v. Haridas AIR 1915 Cal 161, 167.
 7. Jagannath v. Byomkesh AIR 1973 397, 398.
 8. Ram Rattan v. Bajrang Lal AIR 1978, 1393, 1396.
 9. See M.L. Jain's discussion on the point in "Is an Osra an Interest in Immovable Property?" AIR 1969 Jnl., 80H-101.

In Jagdeo v. Ram Saran¹ where the plaintiff brought the suit inter alia for the partition of the right to do worship the Patna High Court held that a pala or a turn of worship was not an interest in immovable property.² The High Court did not give any reasons for its decision; it simply relied on two Calcutta cases of Jati Kar v. Mukunda Deb³ and Eshan Chunder Roy v. Monmohini Dassi.⁴ In Jati Kar's case⁵ the suit was instituted by the plaintiff for the recovery of possession of a turn of worship in a certain temple for eight days in a month. The High Court of Calcutta relied on Eshan Chunder's case⁶ for its ruling that a pala was not an interest in immovable property.⁷ The case of Eshan Chunder⁸ was involved with the main issue of the right of the plaintiff worshipping two idols. As regards one of them the plaintiff claimed her right of worship only during one-sixth of the year. The High Court of Calcutta ruled that the right of worshipping an idol was not in the nature of an interest in an immovable property.⁹ The High Court did not advance any reason for its decision. Again in Narasingha v. Prolhodman Tevari¹⁰ where the suit was brought to enforce a mortgage of a pala or turn of worship the High Court of Calcutta without any discussion simply relied on Eshan Chunder Roy v. Monmohini Dassi¹¹ and Jati Kar v. Mukunda Deb¹² and held that a turn of worship was not an interest in immovable property.¹³

But the Bombay High Court held the reverse view on the question whether a pala or turn of worship was an interest in the nature of an immovable property. In Krishnabhat v. Kapabhat¹⁴ where the plaintiff, a hereditary

1. AIR 1927 Pat 7.

2. Ibid., p. 8.

3. ILR (1912) 39 Cal 227.

4. ILR (1879) 4 Cal 683.

5. ILR (1912) 39 Cal 227.

6. ILR (1879) 4 Cal 683.

7. ILR (1912) 39 Cal 227, 230.

8. ILR (1879) 4 Cal 683.

9. Ibid., p. 685.

10. AIR 1919 Cal 671.

11. ILR (1879) 4 Cal 683.

12. ILR (1912) 39 Cal 227.

13. AIR 1919 Cal 671, 671.

14. (1869) 6 BHCR 137.

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1a "Nibandha" means corrody, pension or allowance. for a discussion see Kane, op.cit., vol.3,575; Derrett has fully explained the term in ZVR 64 (1982),15-130.74-75 Nibandha has striking resemblance with nivi, see Derrett, "Nivi", Vishehvarāṇḍ Iddological Journal, 12(1974), 1-2, 89-95.

priest, brought the suit to establish his right to officiate and to take a share of the proceeds of the ceremonies, the main question to be decided by the Bombay High Court was whether the office of hereditary priest should be held to be immovable property within the meaning of the Limitation Act 1859 (Act 14 of 1859). It was held that the office of hereditary priest of a temple being by Hindu law classed as ^{1a} nibandha should be held as immovable property.¹ In Balvant Kav v. Purshotam² Westropp, C.J. in his judgement of the Full Bench agreed with the view³ held in Krishnabhat v. Kapabhat⁴ but earlier in the same case in a Division Court West, J. expressed doubt⁵ as to the correctness of the decision in Krishnabhat v. Kapabhat.⁶ After an exhaustive survey of Hindu law Westropp, C.J. pointed out in effect that Hindu law was the proper source of information on the question whether the right to an office of hereditary priest was an interest in immovable property. The Privy Council approved both the Bombay High Court cases in Maharana Futtehsangji v. Dessai Kullianrai⁷ where the main issue to be decided was whether a right to a toda giras⁸ hak,^{*} was an interest in immovable property. Toda giras hak was held by the Privy Council as immovable.¹⁰ The Calcutta High Court held in Raghoo Pandey v. Kassy Parey,¹¹ a case where the suit was brought for redemption of a share of Brit Jugmanka, that a right to officiate as priest at funeral ceremonies "ranks amongst immovable property according to Hindu law."¹² The High Court referred with approval¹³ to the aforesaid two Bombay cases and the Privy Council case.

1. (1869) 6 BHCR 137, 139.

2. (1872) 9 BHCR 99 (FB).

3. Ibid., p. 113.

4. (1869) 6 BHCR 137.

5. (1872) 9 BHCR 99 (FB), 101-103.

6. (1869) 6 BHCR 137.

7. (1874) 21 WR 178(PC)

8. "Toda Giras" means "an annual fixed money payment in the nature of blackmail ..." See Sumbhoolal v. Collector of Surat (1869-61) 8 MIA 1.

9. Ibid., note 'a' of p.2.

10. (1874) 21WR 178(PC) 182.

11. (1884) 10 Cal 73.

12. Ibid., p. 73.

13. Ibid., pp. 73-74.

^{*}/a species of hereditary tenure in Bombay/Gujarat area,^{9*}

In this context the difficulty is that the distinction between movables and immovables is applicable not only to material objects but also to rights, the law recognises certain attributes which pertain to material things only. "Every right over an immovable thing is itself immovable ... The rights are situated where they are exercised and enjoyed."¹ The right to worship and to receive offerings is exercised and enjoyed in a temple and since the temple is an immovable property the right itself is an immovable property also.²

The controversy over the issue whether a pala or a turn in rotation for worship in a Hindu temple is an interest in an immovable property has been finally resolved by the judgement of the Supreme Court in Ram Rattan v. Bajrang Lal³ in which the Court discussed the question at issue elaborately.⁴ It referred inter alia to the decisions in Krishnabhat v. Kapabhat,⁵ Balvant Rav v. Purshotam,⁶ Raghoo Pandey v. Kassy Parey⁷ and Angurbala v Debarata⁸ and ruled that the right to worship by turn or pala or osra was immovable property. Thus, Desai, J. pronounced that

"The hereditary office of shebait which would be enjoyed by the person by turn would be immovable property."⁹

Can Shebaiti be Transferred to a Stranger?

In Ram Rattan v. Bajrang Lal¹⁰ one Mst. Acharaj purported to transfer her shebaiti right (pala) by gift to Ram Rattan, the appellant. The facts of the case reveal that Ram Rattan to whom shebaiti or pala was transferred by Mst. Acharaj, was an outsider or a stranger to the religious office and the dedicated property. Now, the most important question was whether

1. M.L. Jain, op.cit., 101.

3. AIR 1978 SC 1393.

5. (1869) 6 BHCR 137.

7. ILR (1884) 10 Cal 73.

9. AIR 1978 SC 1393, 1397.

2. M.L.Jain, ibid., p.101.

4. Ibid., pp. 1395-1397.

6. (1872) 9 BHCR 99 (FB).

8. AIR 1951 SC 293. See above, p.218.

10. Ibid.

shebaiti of a private or family endowment was transferable to a stranger who had no relationship with the members of the family.

Though the Supreme Court did not hold the alienation of pala to the appellant, Ram Rattan, as valid, on the technical ground that the instrument of alienation by gift was not duly stamped, it pronounced that the hereditary office of a shebait "appears to be heritable and partible in the strict sense and it is enjoyed by heirs of equal degree by turn and transferable by gift subject to the limitation that it may not pass to a non-Hindu."¹ The obiter dicta of the Supreme Court are binding on all Courts except the Supreme Court and this extraordinary statement of law can have unforeseen consequences. So the law has been propounded by the Supreme Court that an alienation of shebaiti by gift can be held valid if it is made to a stranger who is neither the next heir, nor a possible heir, or even a person related to the family, and whose only qualification is that he is a Hindu! Then, the Supreme Court would not have hesitated to hold the transfer of shebaiti by Acharaj to Ram Rattan as valid but for the document not being duly stamped. No doubt the Court may have been glad (as so often happens) to take advantage of a technicality to avoid an embarrassing decision on the merits: but it is far from clear that ^{the} plaintiff had merit and the obiter dicta are now permanently in our books. It is submitted that the highest Court in India has laid down as law something which has never found support in the uniform rulings of the Supreme Court, the Judicial Committee and the different High

1. Per Desai, J. AIR 1978 SC 1393, 1396. Emphasis provided.

A quite inadequate statement for its background. One might wonder whether, in the present case, the learned Judge of the Supreme Court, ignoring the law on the subject, had at the back of his mind the decision of the Madras High Court in T.V. Pillai Charities v. Thavasiah (1976) 1 MLJ 185. In that case the Subordinate Judge, on an application made by a descendant of the author of the trust in question, modified the scheme in a way not even asked for by the applicant. The learned Subordinate Judge "altered the scheme by introducing the expression 'trustees professing Hindu religion' instead of 'trustees of whom one shall be a Brahmin and the other two caste Hindus'"⁴ Seep. 188. Upholding the ruling of the lower Court, Rao J. (at pp. 187-188) observed for the High Court that "Our country being secular and the Constitution not providing for such differentiation, on the basis of caste, the venture of the learned Subordinate Judge in having enterprisingly cast an amendment to Clause 5 of the scheme decree, is beyond reproach and condemnations".

Courts on the question of alienability of shebait to a stranger.¹

In Rajah Vurmah's case² Sir James Colville's observation that

"It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust, to a single individual who might act according to its sole direction and might have no connection with the families from which the trustees were to be taken."³

had laid down as law that shebaiti could not be transferred to a stranger, for a reason which is immediately intelligible and has never been contradicted in India. The decision in Rajah Vurmah's case,⁴ "has been followed in numerous cases, the propriety of it on the actual facts of the case has never been questioned in any subsequent decision."⁵ But the Supreme Court has failed to apply the decision to the facts of the present case.

In Kuppa v. Dorasami⁶ a priest sold his right of performing worship in certain temples to a stranger. The main point for decision was whether the priest could make a valid alienation of his right to worship to an outsider. Innes and Kindersley, JJ., observed that

"It is argued that in the present case the alienee is of the same caste and sect as the alienor, and that no objection to fitness to perform the worship exists in this case. But we

1. Ukoor Doss v. Chunder Sekur Doss (1865) 3 WR 152; Keyake-Ilata v. Yaddatil (1868) 3 Mad HCR 380; Rajah Vurmah v. Ravi Vurmah (1876-77) 4 IA 76; Narasimma v. Anantha IIR(1881)4 Mad 391; Kuppa v. Dorasami IIR (1882) 6 Mad 76; Rama Varma v. Raman Nayar (Ayancheri v. Acholathil) IIR (1882) 5 Mad 89; Durga Bibi v. Chanchal Ram IIR (1882) 4 All 81; Mancharam v. Pranshankar IIR (1882) 6 Bom 298; Rajaram v. Ganesh IIR (1898) 23 Bom 131; Narayanan v. Lakshmanan AIR 1915 Mad 1196; Rajram Bhattar v. Singarammal AIR 1919 Mad 570; Panchanan v. Surendra Nath AIR 1930 Cal 180; Jogesh Chandra v. Dhakeswari Mata AIR 1942 Cal 26; Bhagaban v. Narayana AIR 1946 Pat 27. In that case, though the main issue to be considered was whether the defendant Narayana acquired shebaiti for himself alone or for the joint family of which he was a member, the High Court (p.29) in the context of alienation of shebaiti, held that "the Courts should refuse to recognise it as being against public policy, specially where the sale is made to a stranger for the pecuniary benefit of the vendor." The correct position was therefore known in Patna as late as 1946.
2. (1876-77) 4 IA 76.
3. Ibid., p. 81. Emphasis provided.
4. (1876-77) 4 IA 76.
5. B.K. Mukherjea, op.cit., 3rd ed., 179.
6. IIR (1882) 6 Mad 76.

are not disposed to hold that this of itself will validate such an alienation. To hold so would tend to public mischief in inducing needy incumbents of hereditary religious offices who desired to sell them to give a dishonest recognition to qualifications which, in fact, were not the qualifications demanded by the nature of the office."¹

Moreover, if alienation is permitted to be made to a stranger having no relationship with the family and the endowment, then the religious office will be the subject of bargain and this will defeat the intention of the founder. In Narayana v. Ranga,² as the plaintiff's father was not the sole and immediate heir, the High Court of Madras held that the transfer of the office of the pujari (priest) to the plaintiff's father was not valid. The Court arrived at the decision on the ground that "unless the alienee is the sole heir, the alienor might be under temptation to make the office the subject of bargain and thereby defeat the intention of the founder."³ The reasoning is more applicable to the case of the alienation of religious office to an outsider. For, a needy or greedy incumbent of a hereditary office will transfer his office to the highest bidder, defeating the intention of the founder.

In Rajaram v. Ganesh,⁴ the original owner of the property in dispute transferred the property, including his right of worship, to the plaintiff who was a stranger to the family. In the context of hereditary service in temples, Ranade, J. observed that "Alienations to strangers are indeed not favoured."⁵

In Ukoor Doss v. Chunder Sekur Doss,⁶ one of the shebaitis transferred his shebaiti (turn of worship) without any consideration to the defendant, a Brahmin, who was otherwise qualified to carry on the purposes of the endowment. The transfer of shebaiti was held to be invalid beyond the lifetime of the alienor and the Court held that "It is the essence of a family

1. ILR (1882) 6 Mad 76, 79.

3. Ibid., p. 186.

5. Ibid., p. 135.

2. ILR (1892) 15 Mad 183.

4. ILR (1899) 23 Bom 131.

6. (1865) 3 WR 152.

endowment amongst Hindoos, that no stranger shall be permitted to intrude himself into the management of the endowment."¹ The dictum in the Ram Rattan case² that shebaiti can be transferred by gift to any Hindu is directly against the rule laid down in Ukoor Doss's case³ that shebaiti is not transferable even without any consideration to any outsider, whether he is a Hindu, a Brahmin or non-Brahmin.

In Ram Rattan's case,⁴ Ram Rattan was a stranger to the management of the endowment and on that ground alone the suit could have been dismissed. Then the Supreme Court would not have to waste time considering a relatively unimportant issue whether the document of transfer of shebaiti should have been received in evidence unstamped. In Panchanan v. Surendra Nath,⁵ the plaintiff claimed to succeed exclusively to the office of the shebait after an arrangement by which Mayabati, the widow of the previous shebait, Ramsevak, gave up her claim to shebaiti in his favour. Rankin, C.J. dismissing the plaintiff's claim, held that "In my judgement, the plaintiff is not entitled to stand in the shoes of Ramsevak for this purpose. He is a mere stranger to this religious office and dedicated property, and on that ground alone his suit cannot succeed."⁶ In his judgement of the same case, C.C. Ghose, J., observed that "In my view, Mayabati still remains a shebait, then, so far as the plaintiff is concerned, he is a mere stranger and he cannot step in the shoes of Ramsevak and claim as shebait. This conclusion would be sufficient to enable the Court to dispose of the plaintiff's suit by saying that it is incompetent."⁷

In Panna Banerjee v. Kali Kinkor⁸ it was held by the Calcutta High Court that a transfer of shebaiti to a stranger had not got "the sanction of law behind it."⁹ Again, it was observed in the same case that shebaiti could

1. (1865) 3 WR 152.

2. AIR 1978 SC 1393.

3. (1865) 3 WR 152.

4. AIR 1978 SC 1393.

5. AIR 1930 Cal 180.

6. Ibid., p. 185.

7. Ibid., p. 187.

8. AIR 1974 Cal 126. Supra, p.239.

9. Ibid., p. 136.

never be transferred by sale, because it was against public policy.¹

The Supreme Court in Kali Kinkor v. Panna Banerjee² also shared the same view with the High Court and ruled that the transfer of shebaiti by sale was illegal and the sale was void in its inception.³

Again, shebaiti cannot be alienated to a stranger, even on the footing of a custom. In Jogesh Chandra v. Dhakeswari Mata,⁴ a custom was established according to which palas or turns of worship could be privately alienated either to persons professing the Hindu faith belonging to any of the three higher castes or to sanyasis (fakirs). Mukherjea, J. who delivered the judgement of the case, observed that

"In my opinion, the custom that is set up here is not only prejudicial to the interests of the deity, but is also against the presumed intentions of the founder. In the case of a private debutter, the intention of the founder undoubtedly is that the shebaitship should ever remain in his family, or it would pass to such person or persons as he himself had indicated. It cannot be his intention that it should pass to a total stranger."⁵

So the rule has been made clear in that case that shebaiti cannot be alienated to a stranger, even on the footing of a custom, in spite of the fact that he is a Hindu. The rule was again reiterated by the same learned judge as a judge of the Supreme Court in Kalipada v. Palani Bala⁶ in which an alienation of shebaiti was made by sale in favour of a stranger. His Lordship pronounced for the Highest Court that "The proposition is well established that the alienation of the shebaiti right by a shebait in favour of a stranger is absolutely void in Hindu law and cannot be validated even on the footing of a custom".⁷

It is regretted that the highest Court in India, without citing any case, has laid down a law in Ram Rattan's case⁸ which is directly opposed to the firmly established view held by the Supreme Court, the Judicial Committee,

1. AIR 1974 Cal 126, 145.

3. Ibid., p. 1936.

5. Ibid., p. 31. Emphasis provided.

7. Ibid., p. 127. Emphasis provided.

2. AIR 1974 SC 1932. Supra, p.231.

4. AIR 1942 Cal 26.

6. AIR 1953 SC 125.

8. AIR 1978 SC 1393.

the Bombay, the Calcutta, the Madras and the Patna High Courts that an alienation of shebaiti to a stranger is not valid. It is also contrary to the extremely careful Kali Kinkor v. Panna Banerjee case.¹

Section 5. DEVOLUTION OF SHEBAITI

The founder of an endowment has (as we have seen in sec. 2 of this chapter) the right to appoint a shebait.² It is open to the founder in whom shebaiti is vested in the first instance³ to dispose of the shebaiti right, a heritable property like any other species of heritable property.⁴ "Shebaitship being property it devolves like any other species of heritable property."⁵

Before the commencement of the Hindu Succession Act, 1956 (Act 30 of 1956), if the instruction of a founder could not be traced, the custom of the endowment ruled.⁶ Thus in Bhabatarini v. Ashalata⁷ it was held that the mode of devolution prescribed by the ordinary law should give way to let in the nominees of the founder. But now most customs are abrogated by the Hindu Succession Act, 1956 and customary succession to shebaiti ceased after the commencement of the 1956 Act.⁸

1. AIR 1974 SC 1932.

2. Derrett, IMHL, 499.

3. N.R. Raghavachariar, op.cit., Vol. 1, 7th ed. , 664.

4. Angurbala v. Debabrata AIR 1951 SC 293, 296; Kalipada v. Palani Bala AIR 1953 SC 125, 130; Profulla Chorone v. Satya Choron AIR 1979 SC 1682, 1686; Kalyan Das v. Rambir Das AIR 1980 NOC 123 (All). Shebaiti is not a property when a shebait has not any personal interest in the endowed property - see on this point Sri Raman Lalji v. Gopal Lalji ILR (1897) 19 All 428, 433; Padmabati v. Biswanath AIR 1976 Cal 344, 346. For the (exploded) view that shebaiti is not a property at all see Sripati v. Khudiram AIR 1925 Cal 442, 445.

5. Per Sarkaria, J., Profulla Chorone v. Satya Charon, AIR 1979 SC 1682, 1686.

6. Derrett, IMHL, 499.

7. (1942-43) 70 IA 57, 65.

8. Derrett, IMHL, 499. Parameswaran Pillai v. Sivathanu Pillai (1978) 2 MLJ 19 (hereditary trustees entitled to material benefits).

Section 4(1) of the Hindu Succession Act, 1956 (Act 30 of 1956)

provides that

"Save as otherwise expressly provided in this Act, - (a) any text rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act; (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act..."¹

If a founder has not disposed of the shebaitship the devolution of the office will take place in accordance with the line of inheritance from the founder to his heirs.² Again, undisposed shebaiti devolves on the heirs of the founder and to this effect the principle had been enunciated in the leading Privy Council case of Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee³ that

"According to Hindu law, when the worship of a thakoor has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstance to show a different mode of devolution."⁴

But it must be remembered that at present in an endowment a founder can do very little "to provide for the devolution of the shebaiti otherwise than according to the scheme of succession set out in the Hindu Succession Act, 1956."⁵ "It is the general law of succession that governs succession to shebaitship as well."⁶ A founder must lay down (if at all) the line of succession to shebaiti consistent with the general law of succession.⁷ The mode of devolution of shebaiti must not be contrary to the provisions of Hindu law.⁸ The law is directly derived from the traditional abhorrence of

1. See Derrett, IMHL, 578.

2. Ram Rattan v. Bajrang Lal AIR 1978 SC 1393, 1395.

3. (1888-89) 16 IA 137.

4. Per Lord Hobhouse, ibid., p. 144.

5. Derrett, IMHL, 500.

6. Per Mukherjea, J., Augurbala v. Debabrata AIR 1951 SC 293, 299. See above, sec. 1 of this chapter.

7. Hiranbala v. Bishnupada AIR 1976 Cal 404, 405.

8. Raikishori Dassi v. Official Trustee AIR 1960 Cal 235, 243; Anath Bandhu De v. Krishna Lal Das AIR 1979 Cal 168; Sitesh Kishore v. Ramesh Kishore AIR 1981 Pat 339, 343; Durga Prosad v. Sri Rameswar Jew Siba Thakur AIR 1981 Cal 92, 93.

unrecognised perpetuities.¹

Now, the general law of succession is not what it was at the time of the decisions in so many cases of both the Supreme Court and the Privy Council on the question of devolution of shebaiti before 17th June, 1956. At present, the general law of succession must comprise the Hindu Succession Act, 1956 (Act 30 of 1956). To quote a relatively recent conjecture: "Prima facie all cases in which a shebait dies after 17th June 1956 must be governed by the Hindu Succession Act and shebaiti will pass by survivorship or succession as the case demands."²

If there is no disposition shebaiti will devolve according to the ordinary Hindu law of succession.³ In Prefulla Chorone v. Satya Chorone⁴ the Supreme Court very recently reaffirmed the famous rule in Gossamee Sree Greedhareejee's case⁵ and held that undisposed "shebaiti rights remained with the heirs of the founder"⁶ and ordinary rules of succession would be applicable in case of devolution of shebaiti.⁷

Again, shebaiti being a property within the meaning of the Hindu law of succession,⁸ in so far as succession to shebaiti is concerned the rules of the Hindu Succession Act unquestionably, as we have seen, have an overriding

1. Ibid. Reliance is placed upon Tagore v. Tagore (1872-73) IA Sup. vol. 47. See below p. 253.

2. Derrett, IMHL, 499. Illustrated at Parameswaran Pillai v. Sivathanu Pillai (1978) 2 MLJ 19 (below) and Kalinath Mukherji v. Santilata Devi AIR 1978 Cal 371.

3. Jagannath v. Byomkesh AIR 1973 Cal 397, 398. The case followed both Monohar Mukherji v. Bhupendra Nath AIR 1932 Cal 791 (FB) and Ganesh Chunder v. Lal Behary AIR 1936 PC 318, which held that succession to shebaiti would be according to ordinary Hindu law of succession.

4. AIR 1979 SC 1682.

5. (1889) 16 IA 137.

6. Per Sarkaria, J., AIR 1979 SC 1682, 1689. Illustrated at Anath Bandhu De v. Krishna Lal Das AIR 1979 Cal. 168.

7. AIR 1979 SC 1682, 1689.

8. Angurbala v. Debabrata AIR 1951 SC 293.

effect upon customs. There is nothing, therefore, to restrain the frequent partitioning of shebaiti amongst distantly related heirs of equal degree, or the featuring of debutter in family arrangements between a whole concourse of heirs on an intestacy or deemed intestacy. In Parameswaran Pillai v. Sivathanu Pillai,¹ a case concerning the succession of hereditary trusteeship,² Ramaprasad Rao, J., referring to sec. 4 of the Hindu Succession Act, 1956, held that

"undoubtedly section 4 has an overriding effect. The statute law having made marked inroads upon the personal law of the parties, has provided that any custom or usage immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made under this Act."³

Now a founder of a Hindu religious endowment is still competent to lay down rules to govern the succession to shebaiti right but his powers to dispose of shebaiti right are subject to the same restrictions which exist in relation to disposal of any other property according to Hindu law. In Monohar v. Bhupendra Nath⁴ where an issue to be decided by the Full Bench of the Calcutta High Court was whether a Hindu founder of a religious endowment was competent to lay down rules to govern the succession to shebaiti, Mitter, J. observed that the founder could lay down rules "but subject to the restriction that he cannot create any estate unknown to Hindu law."⁵ The High Court rejected the view voiced in Sripati v. Khudiram⁶ that the rule laid down in the famous case of Tagore v. Tagore⁷ prohibiting a Hindu to create a line of succession inconsistent with Hindu law did not apply to the appointment of a shebait. The Judicial Committee approving the decision in Monohar's case⁸ ruled in Ganesh Chunder v. Lal Behary⁹, a case

1. (1978) 2 MLJ 19.

2. Hereditary trusteeship is property - on this point see S. Mudaliar v. State of Madras (1970) 2 SCJ 131, 132.

3. (1978) 2 MLJ 19, 26.

4. AIR 1932 Cal 791 (FB).

5. Ibid., p. 796.

6. AIR 1925 Cal 442.

7. (1872-73) IA Sup. vol. 47.

8. AIR 1932 Cal 791 (FB).

9. AIR 1938 PC 318.

relating to the question of validity of certain provisions of shebaitship, that Tagore v. Tagore¹ was applicable to the appointment of a shebait.² But the said rule in Tagore v. Tagore³ is not applicable to offices which are not property. The office of a dharmakarta (manager) which has no emoluments attached to it apparently does not come within the purview of the rule. In Manathunainatha v. Sundaralingam⁴ the Madras High Court dealing with the correctness of the decision of an earlier case⁵ of the same Court held that the founder of a religious endowment has "the right to dispose of the dharmakartaship in any particular way."⁶

In this context it may be pointed out that the issue as to whether a founder can change the line of succession after it has been laid down in the instrument of dedication is still a controversial one. The principle that unless the right of revocation of the line of succession to shebait is reserved in the endowment the founder cannot subsequently change, revoke or alter the line of succession as laid down in the endowment, was enunciated in Gouri Kumari v. Ranimoyi.⁷ In that case the founder became the first shebait of an endowed property and in the endowment it was provided that after his death shebaitship would devolve on his first wife. But later on he changed his mind and appointed his second wife as shebait. Woodroffe, J. ruled that the founder "could not make any change in the order of succession of shebaits unless he had made reservation to that effect in the deed..."⁸

This decision was followed in many cases⁹ but it must be pointed out that

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| 1. (1872-73) IA Sup. vol. 47. | 2. AIR 1938 PC 318, 320. |
| 3. (1872-73) IA Sup. vol. 47. | 4. AIR 1971 Mad 1 (FB). |
| 5. <u>Manathunainatha Desikar v. Gopala</u> (1943) 1 MLJ 434. | |
| 6. <u>Per Natesan, J.</u> , AIR 1971 Mad 1 (FB), 14. Followed in <u>V.R. Santhanam Iyer v. V.S. Sundarathammal</u> AIR 1981 Mad 244, 246. | |
| 7. AIR 1923 Cal 30. | 8. <u>Ibid.</u> , p. 31. |
| 9. <u>Lalit Mohan v. Brojendra Nath</u> AIR 1926 Cal 561, 563; <u>Manorama Dasi v. Dhirendra Nath</u> AIR 1931 Cal 329, 331; <u>Narayan Chandra v. Bhuban Mohini</u> AIR 1934 Cal 244, 246; <u>Brindaban v. Sri Godamji Maharaj</u> AIR 1937 All 394, 394; <u>Radhika v. Amrita</u> AIR 1947 Cal 301, 303. In <u>Brindaban v. Ram Laxhan</u> , | |

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Woodroffe, J.'s observation was not an original one on the subject. The principle as involved in his Lordship's observation had been laid down long before in Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee¹ and a clear exposition of the law in question was made later on in Narayan Chandra v. Bhuban Mohini.² Mukherjee, J. observed that

"The Judicial Committee in the case of Gossamee Sree Greedharreejee v. Rumanlolljee³ has very clearly pointed out that when the founder of an endowment dedicates properties to a deity and appoints a shebait or lays down the order of succession to shebaitship, he makes a gift with a condition attached and that the deity or those who speak for him on earth need not take advantage of the gift but that if the gift is taken and the condition insisted on, it must be observed....

"When the gift to the deity has taken effect, the donor or founder, in the absence of reservation to the contrary, ceases to have any proprietary right in the properties, the subject-matter of the gift and such right thereupon vests in the deity."⁴

In Sripati v. Khudiram⁵ the issue in question did not arise directly but Chakravarti, J. discussed the law in question at considerable length. Although his Lordship did not refuse to accept the rule in Gourikumari's case,⁶ he remarked that as the appointment of a shebait is an appointment to an office of a peculiar nature the power of a founder to appoint a shebait "should be presumed to exist unless expressly given up."⁷

Again, even if the right of the founder is not reserved at the time of laying down the mode of devolution in the endowment it was held that the succession to shebaiti could be relaxed both in the interests of the deity and justice. In Radheshyam v. M.K. Narain⁸ where the dispute was related

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AIR 1975 All 255, 258, though the Allahabad High Court did not refer to Gouri Kumari's case, AIR 1923 Cal 30, it followed Brindaban v. Godamji Maharaj, AIR 1937 All 394, which applied the decision in Gouri Kumari's case on the point in question.

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| 1. (1888-89) 16 IA 137, 147. | 2. AIR 1934 Cal 244. |
| 3. (1888-89) 16 IA 137. | 4. AIR 1934 Cal 244, 249. |
| 5. AIR 1925 Cal 442. | 6. AIR 1923 Cal 30. |
| 7. AIR 1925 Cal 442, 446. | 8. (1971) 69 ALJ 563. |

to the management of a temple and its properties in terms of an arbitration award, Shukla, J. pronounced for the High Court of Allahabad that

"although the alienation in the line of succession to shebaitship is generally irrevocable unless a contrary right has been reserved by the testator, yet in certain circumstances the rule permits of relaxation in the interests of justice... notwithstanding the original line of succession of shebaitship contained in the will, there is no rule of law which precludes a shebait from not shouldering the responsibility himself and allowing the other heirs to manage the temple properties and if such management is entrusted, it neither amounts to ouster of the other heirs so as to extinguish their rights nor can such entrustment be rendered legally void on account of being inconsistent with the direction of the original will creating an endowment and binding the shebait." ¹

So his Lordship's observation is applicable only in exceptional circumstances, and is suspect as introducing an element of unpredictability and uncertainty into the law.

To conclude this study it may be pointed out that so far as the devolution of shebaiti is concerned, it must be consistent with the provisions of the Hindu law of succession. If any provision in the instrument of dedication regarding the succession to shebaiti is inconsistent with the provisions of the Hindu Succession Act, 1956 (Act 30 of 1956), the provision of the instrument must be held invalid. We have alluded to problems this situation creates and to these we now turn.

Section 6. MANIFEST PROBLEMS AND POSSIBLE SOLUTIONS

Virtually all the problems relating to shebaiti centred upon the two accepted but incompatible theories that the idol as a juristic person² is the owner of any debutter³ and the shebait as a manager of an idol has not only right in his office but also has a beneficial interest in the debutter.⁴

1. (1961) 69 ALJ 563, 568.

2. Monohar Ganesh v. Lakhmiram ILR (1887) 12 Bom 247; Pramatha v. Pradhyunma AIR 1925 PC 139.

3. Vidya Varuthi v. Balusami (1921) 48 IA 302; Kalanka Devi v. M.I.T., Nagpur AIR 1970 SC 439.

4. Bhabatarini v. Ashalata (1942-43) 70 IA 57, 65; Angurbala v Debabrata AIR 1951 SC 293.

Shebaiti being a property¹ within the meaning of the Hindu succession law, the Hindu Succession Act, 1956 (Act 30 of 1956) has posed the biggest problem relating to the proper administration of any endowed property because of its indirect effect of causing shebaiti to be divided almost every time a shebait dies.² Now, when shebaiti as property passes, on intestacy, to a large number of heirs both agnates and cognates, males and females, obviously it will pass being fragmented among heirs some of whom may not be interested in the worship of the idols.³ This effect of the succession law may easily raise the question of the validity of the rule that all shebaits must concur in the management of the debutter including any alienation of debutter property for the benefit of the idol. This rule may possibly be abandoned in favour of a rule to the effect that the decision of those shebaits who are directly concerned with an endowment relating to a scheme of management of the debutter should be binding on the idol in the same way as a family arrangement and later on no other shebaits will be allowed to object to the decision.⁴ The potential of the family arrangement to cope with such problems is known,⁵ and the institution as such has been the subject of frequent notice in the Supreme Court.⁶

Again, the problem relating to so many heirs of shebaiti may be solved if the present provision regarding succession to shebaiti only should be changed. It is not suggested that the property aspect of shebaiti should be scrapped altogether as suggested in the Ramaswami Aiyar Report on Hindu

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1. Angurbala v. Debarata AIR 1951 SC 293, above p. 218; Kalipada v. Palani Bala AIR 1953 SC 125; Ram Kattan v. Bajrang Lal AIR 1978 SC 1393; Profulla Chorone v. Satya Chorone AIR 1979 SC 1682; Kalyan Das v. Rambir Das AIR 1980 NOC 123 (All).
 2. Derrett, Critique, 386.
 3. Radha Charan v. Iswar AIR 1942 Cal 295. In that case, it was held that the ejectment notice served on the defendant tenant was not valid, because all the shebaits did not join in serving the notice in question.
 4. Derrett, Critique, 387.
 5. Derrett, "Family arrangements..." ECMHL, Vol. 4, 258 ff.
 6. Derrett, ibid., p. 284.

endowments.¹ The rule of succession to shebaitship could be changed by statute from the existing provision to a new provision of law to the effect that shebaiti will always be vested in one person, say, the oldest issue of the family of a particular endowment willing and fit to undertake it. Then the problem concerning the rule that all co-shebaiti must act together² relating to the management of a debutter could be avoided. Shebaiti being a special kind of property,³ it is not by nature physically divisible like immovable properties. If "property, which in its nature is impartible, as a Raj or ancient Zemindary can...only descend to one of the issues"⁴ why cannot a shebaiti in its nature being impartible, be vested in one person only? Yet the partibility as well as hereditability of shebaiti is taken for granted in all our books.

In so far as a religious endowment is concerned the paramount consideration is the fulfilment of the purpose of the endowment. So in the idol's interest and for the administration of a debutter at least the heirs who are directly concerned with the endowment may be allowed to eliminate from managing the debutter distant heirs or the heirs who are not interested in the worship of the idol. Such a device will have the effect of reducing the number of disputes over the right of management of the endowment property.⁵ The distribution of the income after payment of tax may be a second consideration.

The problem regarding succession to shebaiti, especially relating to so

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1. The Report of the Hindu Religious Endowment Commission (1960-62), 173-194, see specially page 194 where it was specific about the proprietary element of shebaiti; the same view was held by J.M. Jain, Right of Property, 1968, 69-70, 307-308, cited in Derrett's Critique, 386, footnote 6; See also R.N. Sarkar, "Has a Shebait or a Mahant Proprietary Right in Endowment", AIR 1954 Jnl., 93-94. The writer is of the opinion that a shebait might be appointed with a fixed remuneration.
 2. Man Mohan Das v. Janki Prasad (1944-45) 49 CWN 195 (PC). In that case the Judicial Committee pointed out in effect that in so far as the administration of a debutter or that of a trust was concerned the office of co-shebaiti and that of co-trustees were on the same footing. To that effect the Privy Council quoted Lewin's Law of Trusts: see pp. 201-202.
 3. Sovabati Dassi v. Kashinath AIR 1972 Cal 95.
 4. Mayne's Hindu Law, op.cit., 6th ed., 713. 5. Derrett, Critique, 387, 388.

many heirs of a particular shebait, would not have been so acute but for the reason that "transfer of shebaiti by will is almost unknown".¹ The restriction on transfer of shebaiti may be lifted to the extent that the distant heirs, who have not much beneficial interest in the endowment, may be allowed to dispose of their shebaiti under assignments or by way of family arrangement in favour of other heirs who have more interest in the idol and its property. But the heirs who have a priority interest in the endowment will not be permitted to dispose of their shebaiti right by testament. Otherwise, shebaiti will be a marketable commodity of very uncertain value and co-shebaiti with some amount of interest may induce each other to dispose of it for a consideration which may not be disclosed to any third party. If, however, testamentary disposition is to be allowed, it must be allowed within the family only. The difficulties that have arisen are almost self-evident and more than a quarter of a century has passed without an attempt to mitigate them.

The rule that the founder cannot change the line of succession after it has been laid down in the instrument of dedication² may be abandoned in favour of the view that the power of a founder-shebait to appoint a shebait by a testament should be presumed to exist unless he has expressly given it up.³ In Zabu Khima v. Amardas⁴ the Gujarat High Court dealt with a will where the founder-testator laid down the line of succession to shebaiti. Bhagwati, J. held that "the shebaitship of the temple in the present case was property and the deceased himself being the founder of the temple was entitled to dispose of the shebaitship by making a will."⁵ The view of the Gujarat High Court seems to be plausible. It can be assumed that a founder-shebait

1. Derrett, Critique, 387.

2. Gouri Kumari v. Ranimoyi AIR 1923 Cal 30.

3. Sripati v. Khudiram AIR 1925 Cal 244.

4. AIR 1967 Guj 214.

5. Ibid., p. 217.

being a founder of the religious endowment will always wish the object of the endowment to be fulfilled. Moreover, it has been pointed out that testamentary disposition of shebaiti by a founder was in vogue even three hundred and seventy-five years ago in the state of Uttar Pradesh.¹ The founder of the Radhadamodara Temple in Vrindaban made a testament envisaging posthumous implementation of its provisions relating to succession to shebaiti of the temple.² The "provisions of the will were in fact admitted and carried out to the letter.... The subject-matter leaves no room for suspicion of malpractice, and the codicil merely confirms that the testator, now near death, has not changed his mind about the succession to his shebaitship."³ Now, the view that the power of a founder to appoint a shebait should be presumed to exist has the practical merit that if after the line of succession to shebaiti has been laid down, a founder thinks that the immediate would-be shebait, as laid down in the line of succession, is not competent to manage the affairs of the deity and the debutter, the founder will have a chance to appoint a suitable shebait instead who can manage the debutter after he dies. It is suggested that it is in the idol's interest that a founder should have the power to dispose of the shebaiti any time before he dies.

Nivi

At this juncture it may be interjected that it is surprising to see that a trust concept called nivi,⁴ which is of Indian origin and was used in ancient India, is apparently no longer in use in the field of Hindu religious endowments. According to this concept, a fund for an endowment was used to be deposited with a banker permanently on condition that a part

1. F. Mukherjee and J.C. Wright, "An Early Testamentary Document....", op.cit., 297-320.

2. Ibid., p. 297.

3. Ibid., p. 301.

4. Derrett, "The Development of the Concept of Property..." ECMHL, vol.2, 61-63.

of the income of the deposited fund would be paid to the beneficiary of the nivi. "This was an excellent method of providing for periodical worship of a deity, or the maintenance of some long-lasting object of charity."¹ A shebait or a mahant could not interfere with the fund placed upon a permanent deposit with the banker and he could not have any proprietary interest in the fund.² The title of the depositary to the capital fund "was nearly that of full owner, except that he could not alienate it so as to impair its capacity to provide the income stipulated."³ But the present concept of shebaiti implying property is a well developed concept evolved out of so many judicial decisions that it seems impossible to change the concept overnight from its present position.

Again, the present position of the law is that the idol owns the endowment and all the offerings⁴ made to it. But it is the shebait who normally sees to the idol's interests and manages all its properties. Now, the first charge which can be made on its property and its income is its meals. "These are prepared, one will suppose, to the taste of those who will eventually eat them, namely those entitled to eat the idol's "leavings", his attendants."⁵ A shebait is not a legal owner and he is also not merely a manager like a bare trustee because of the fact that he enjoys almost the same advantages as he would do if he had the full ownership of the debutter. "If the manager were treated as merely a bare trustee for the idol the purpose of many endowments would be frustrated and the whole transaction might become unworkable."⁶ A religious endowment serves as a mask under which a shebait enjoys personally almost everything that he does for the idol and for the maintenance of the debutter. Hindus make donations and offerings to the

1. Derrett, ECMHL, vol. 2, 63.

2. Dhavan, op.cit., 60.

3. Derrett, ECMHL, vol. 2, 63.

4. Manohar Ganesh v. Lakhmiram Govindram ILR (1887) 12 Bom 247, 258; Brijendra Singhji v. Kishan Ballabh AIR 1981 NOC 131 (All).

5. Derrett, "The Reform of Hindu Religious Endowments", op.cit., 321.

6. Derrett, IMHL, 497.

deities for religious merit but their desire to earn religious merit is not affected by the dishonesty of shebait¹. The remedy is not to abolish the institution or to utilise the endowment for secular purposes as suggested by a social thinker² but is "to bring in the account-book and the ledger, and to call the refractory to heel by due process of law."³

If a new definition of shebaiti excluding its property aspect is formulated and the position of a shebait is transformed in line with the position of a bare trustee then the institution of shebait might wither as we have seen earlier in Derrett's remark and in future there will remain very few private endowments in North India especially in West Bengal where a private endowment is generally made as a function of family management. But we should find a remedy to prevent a shebait from misusing the income of a debutter. Now, in so far as property of shebaiti is concerned a unique and realistic suggestion has been made by Derrett. He observes that

"In the context of the shebait's ownership the answer must be, not that he owns nothing and the idol owns everything (which is fantasy), but that the shebait or shebait^s collectively own the assets and that the assets are subject to a trust which the court must supervise when called upon to do so by a competent person suing in the idol's name and for its welfare, or by the Advocate-General at the relation of interested parties. The same solution would work well if applied to the mahant or a manager of any endowment."⁴

It may be argued that in relation to the proprietary interest of a shebait, in a certain endowment, Derrett's suggestion is at first sight plausible. If all debutter lands were enfranchised and subjected to a statutory charge for the worship of the deity or deities, the shebait or shebait^s could dispose of the lands subject to the charge. But the objection to this is that by repeated transfers of fractions of the lands, through many hands, with no control over alienations for the idol(s)' benefit or necessity as

1. Derrett, "The Reform of Hindu Religious Endowments", op.cit., 321-322.

2. M.P. Chatterjee, Temples and Religious Endowments, B.N. Neogi, Calcutta, 1951, as cited in Derrett's RLSI, 507-508, footnote 2 of 507.

3. Derrett, RLSI, 507-508.

4. Critique, 383.

exists at present, the identity of the trust would be lost, the idol (whose manager would have little or no funds at his disposal to finance litigation) would find it impossible to enforce its rights, thus hopelessly fragmented, and the State's present duty to protect endowments would become a fiction and needless to say further endowments of this type would be seriously prejudiced or totally discouraged.

However, considering all the circumstances in this matter, Derrett's suggestion, just quoted is the only pragmatic solution at this juncture.

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11. See post p. of this thesis .

CHAPTER V

ADMINISTRATION OF DEBUTTERSECTION 1ALIENATION OF DEBUTTER PROPERTYa. Alienation by lease, mortgage and sale

When a dedication to a deity is of an absolute character, the property comprised in it belongs to the deity¹ as a juristic person² but the management and the possession of the dedicated property vest in its shebait³ whose duties are not only to see that the worship of the deity is performed⁴ but also to manage and preserve debutter property.⁵ Although a dedication to a deity may make no mention of a particular person as shebait (as a wakif in Islamic law is not bound to nominate a mutawalli [manager] for his new wakf), the existence of a debutter is wholly inconceivable without a shebait, because the ideal personality of the deity is connected with the human personality of the

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1. Mayne's Hindu Law, op.cit., 11th ed., 926.. See also on this point Brijendra Singhji v. Kishan Ballabh AIR 1981 NOC 131 (All)
 2. Deoki Nandan v. Murlidhar AIR 1957 SC 133, 136. See above, Section 1 of the 3rd chapter.
 3. Maharaja Jagadindra Nath v. Rani Hemanta Kumari (1903-4) 31 IA 203, 210. See above, section 1 of the 4th chapter.
 4. Derrett, IMHL, 498. In the case of a family endowment the members of the family have the right to see that the deity being the object of worship is properly maintained and preserved. See Bhimasena v. Ramesh Chandra AIR 1978 Ori 159, 161.
 5. B.K. Mukherjea, op.cit., 4th ed., 201-2, where the author observes that the shebait "is the person entitled to speak on behalf of the deity on earth and is endowed with authority to deal with all its temporal affairs".

shebait.¹ Practically speaking, there "cannot be property dedicated to an idol without a shebait to manage it".² In other words, all the interests of the deity and the debutter are attended to by the shebait "who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of the infant heirs".³ It is not in truly practical terms but only in an ideal sense that the dedicated property can be said to belong to the deity and

"the possession and management of it must in the nature of things be entrusted to some person as shebait, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed, or wasted, and its worship discontinued for want of the necessary funds to preserve and maintain them".⁴

As a general rule properties given for religious purposes are inalienable.⁵ This general rule was laid down by the Judicial Committee in Maharanee Shibessouree Debia v. Mothooranath Acharjo⁶ where the main issue to be decided was whether or not the grant of a mauroosee (hereditary) tenure of debutter lands at a fixed rent was valid. In that case, it had been held expressly that lands devoted to religious purposes could not

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1. B.K. Mukherjea, *ibid.*, p.276. See also Vidya Varuthi v. Balusami Ayyar (1920-21) 48 IA 302, 311, where Mr. Ameer Ali commented that "When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency".
 2. Per Page, J. Nagendra v. Rabindra AIR 1926 Cal 490, 496.
 3. Per Lord Shaw, Pramatha Nath v. Pradhyumna Kumar, AIR 1925 PC 139, 140, *supra*, p. 138.
 4. Per Sir Montague Smith, Prosunno Kumari Debya v. Golab Chand Baboo, (1874-75) 2 IA 145, 152. *Infra*, p.269.
 5. Prosunno Kumari Debya v. Golab Chand Baboo (1874-75) 2 IA 145, 150 where it was observed that "There is no doubt that, as a general rule of Hindu law, property given for the maintenance of religious worship and of charities connected with it is inalienable". See also Nagendra v. Rabindra AIR 1926 Cal 490, 496 and B.K. Mukherjea *op.cit.* 4th ed. 276.
 6. (1869-70) 13 MIA 270.

be alienated by a shebait but he was empowered to create derivative tenures and estates conformable to usage. Lord Chelmsford, in delivering the judgement, pronounced that

"The talook¹ itself, with which these jummas² connected by tenure, was dedicated to the religious services of the idol. The rents constituted, therefore, in legal contemplation, its property. The shebait had not the legal property, but only the title of manager of a religious endowment... In the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage."³

The Privy Council's ruling that the shebait was not entitled to alienate the debutter by fixing an invariable rent of the lands in question was based on a sound reasoning advanced by it that "To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent, from time to time, would be a breach of duty in a shebait..."⁴ This observation of Lord Chelmsford which made the general law that property dedicated to an idol was inalienable has been reiterated by the Privy Council in a large number of cases and the Supreme Court has not deviated from those decisions.⁵

In the recent case of Sridhar v. Shri Jagan Nath Temple,⁶ the original

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1. It means tract of proprietary land in India. See The Concise Oxford Dictionary, 5th ed., 1964, 1321.
 2. The expression "jummas" means rents, see (1869-70) 13 MIA 270, 273.
 3. (1869-70) 13 MIA 270, 273.
 4. Ibid. p. 275.
 5. Prosunno Kumari Debya v. Golab Chand Baboo (1874-75) 2 IA 145, 150; Seena Pena Mayendi v. Chokkalingam Pillai (1903-4) 31 IA 83, 88, a case where the ex-manager granted the cultivation right of the temple lands permanently. Abhiram Goswami v. Shyama Charan Nandi (1908-9) 36 IA 148, 165 supra, p. 164; Palaniappa Chetty v. Deivasikamony Pandara (1916-17) 44 IA 147, 156. Vidya Varuthi v. Balusami Ayyar (1920-21) 48 IA 302, 325, supra, p. 217; Niladri Sahu v. Mahant Chaturbhuj (1925-26) 53 IA 253, 267, a case where the mahant mortgaged debutter properties to get money to repay earlier loans. Sridhar v. Shri Jagan Nath Temple AIR 1976 SC 1860, 1866.
 6. AIR 1976 SC 1860.

plaintiff submitted that the site on which the two suit rooms stood was granted to his ancestor on a permanent lease by the superintendent of the temple concerned. Though the finding of the Court was that it was a licence, not a lease as claimed by the plaintiff, Singh, J. delivering the judgement for the Supreme Court pronounced that

"The present case is, in our opinion, fully covered by the decision in Shibessouree Debia v. Mothooranath Acharjo, (1869) 13 Moo. Ind. App 270 (PC) where it was laid down as a general rule that apart from unavoidable necessity to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty in the mahant".

The principle as laid down in the above observation of his Lordship is equally applicable to a case of shebait in management of a debutter of a family deity as to that of a mahant in charge of a math property. In Srimath Daivasikhamani Ponnambala Desikar v. Periyannan Chetti² where the main question was related to adverse possession and limitation Sir George Rankin observed for the Privy Council that

"It is clear that permanent lease or absolute alienation of debutter property is beyond ordinary powers of management, whether in the case of the head of a math, the shebait of a family idol, or the dharmakarta of a temple: such alienations can be justified only by proof of necessity for the preservation of the endowment or institution."³

It may be pointed out that the expression "unavoidable necessity" made in the said observation of Singh, J. or any term giving similar meaning was not used in the judgement in Maharanees Shibessouree's case.⁴ The expressions "benefit of the deity", "unavoidable necessity" or "legal necessity" often made in the judgements⁵ in relation to alienation of

1. AIR 1976 SC 1860, 1866.

2. (1935-36) 63 IA 261 = AIR 1936 PC 183.

3. (1935-36) 63 IA 261, 274. 4. (1869-70) 13 MIA 270.

5. For example, see G.V. Kalmath v. Vishnu Dev AIR 1973 Mys. 207, a case where the manager gave some debutter lands on a permanent lease at a fixed rent, the Mysore High Court in holding the rule that "unless it is shown that the permanent lease evidenced by exhibit 85 was entered into for legal necessity or benefit of the deity, the said lease cannot be binding on the deity" referred (at p.211) inter alia to Maharanees Shibessouree's case.

debutter property originate not from the judgement in Maharanee Shibessouree's case¹ but from the decision in the celebrated case of Prosunno Kumari Debya v. Golab Chand Baboo.²

The genesis of the expressions like "benefit of the deity" or "legal necessity" may be found in the interpretation of an observation of Lord Chelmsford in Maharanee Shibessouree's case³ made by the Privy Council in Prosunno Kumari Debya's case.⁴ Before coming to lay down the original rule⁵ that a shebait must of necessity be empowered to do the necessary for the service of the idol and for the benefit and preservation of the debutter, the Privy Council, in the latter case, seems to have built the premises out of the meanings ascribed by it to the observation of Lord Chelmsford in question. Thus in Prosunno Kumari's case⁶ where the shebait borrowed a certain amount of money by pledging the debutter for the repayment of that amount, the Judicial Committee referring to Maharanee Shibessouree's case⁷ held that

"this Committee, whilst considering that the grant of such a pottah by a shebait would be prima facie a breach of trust, expressed an opinion that if the grant had been affirmed by a judgement, the succeeding shebait would have been bound by it, probably for the reason that after a judgement it must be assumed either that such a pottah was warranted by the terms of the original endowment, or by usage, or⁸ was in some way beneficial to the interests of the trust".

And then the Judicial Committee quoted the observation⁹ of Lord Chelmsford that "If the decree appealed against stood unreversed, the title to hold at a fixed invariable rent would on the pleadings, and especially on the judgements, be viewed as res judicata, binding on the parties and those claiming under them".¹⁰

1. (1869-70) 13 M IA 270

2. (1874-75) 2 IA 145, 150.

3. (1869-70) 13 MIA 270

4. (1874-75) 2 IA 145

5. See above for the rule in the observation quoted.

6. (1874-75) 2 IA 145.

7. (1869-70) 13 MIA 270.

8. (1874-75) 2 IA 145, 151

9. For the observation of Lord Chelmsford see (1869-70) 13 MIA 270, 275

10. (1874-5) 2 IA 145, 151.

So expressions like "legal necessity" cannot be traced to the decision in Maharanee Shibessouree's case¹ but it can be ascribed to the judgement in Prosunno Kumari Debya's case² (see below) whose actual decision is based on the judgement of the Privy Council in Hunoomanpersaud's case,³ "the most celebrated of all the cases in Anglo-Hindu law"⁴, which did not in fact concern a shebait or a mahant, but a minor whose affairs were in the hands of a manager.

A shebait being a manager of the deity and being in possession of the debutter is expected to do the necessary for the maintenance of the purposes of the endowment. But if he is given the absolute right to manage the deity's property in whatever way he likes, an unscrupulous shebait may misappropriate either the income of the debutter or the debutter itself. Then not only the purpose of the endowment will be unfulfilled but also the endowment itself will be in danger. But in the course of the administration of a shebait a situation may arise when the existing income or the funds of the endowment may not be sufficient to meet that situation, and to preserve the endowment itself the only recourse open to the shebait may be to get extra funds by pledging or selling the deity's assets. The question whether a shebait is empowered to pledge the deity's property to meet exigencies for the preservation of the endowment

1. (1869-70) 13 MIA 270.

2. (1874-75) 2 IA 145.

3. Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree (1854-57) 6 MIA 393. The suit was brought to recover certain lands and to set aside a mortgage bond and to cancel the appellant's name as mortgagee in the records of the Collector.

4. Derrett, Critique, 425. See his excellent critique on Hunoomanpersaud's case at 425-432 of that book. In Bhabatarini v. Ashalata AIR 1943 PC 89, 93, referring to Hunoomanpersaud's case, Sir George Rankin commented that "perhaps the most often cited of all the cases in the Indian reports...".

itself has been settled by the decision in Prosunno Kumari Debya v. Golab Chand Baboo.¹ Sir Montague Smith delivering the judgement for the Privy Council held that

"notwithstanding that property devoted to religious purposes is, as a rule, inalienable it is, in their Lordships' opinion, competent for the shebait of - property dedicated to the worship of an idol, in the capacity as shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them".²

He made an analogy between the administrative power of a shebait to pledge debutter and the authority of the manager of an infant heir to charge the infant's estate when Sir Montague continued that "The authority of the shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir, which was thus defined in a judgement of this Committee..."³ He quoted⁴ the famous observation of Knight Bruce, L.J., and applied the principles involved in the observation of the Lord Justice in Hunoomanpersaud's case⁵ defining the authority of a manager of an infant heir to charge the infant's estate. Thus Knight Bruce, L.J., observed in Hunoomanpersaud Panday v. Mussumat Baboe Munraj Koonweree⁶ that

"The power of the manager for an infant heir to charge an estate not his own is, under Hindoo law, a limited and qualified power."⁷

1. (1974-75) 2 IA 145.

2. (1874-75) 2 IA 145, 151.

3. Ibid. p.151.

4. Ibid. pp.151-152.

5. (1854-57) 6 MIA 393.

6. Ibid.

7. It must be pointed out that this is not correct Hindu law but it has been accepted as such. Thus Derrett comments in his Critique that "The case was concerned with mortgages to pay debts incurred at an earlier period, some of them to reduce the rate of interest payable. This is not the English law regarding the powers of a guardian. It was very much more limited... It is not the Hindu law, which emphatically said that minors were liable for no debts until they reached majority, and that guardians had no powers of alienation (without the consent, we must understand, of the court). The Mitakshara text which suggests

It can only be exercised rightly, in a case of need, or the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take any advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his own wrong has helped to cause. Therefore the lender in this case, unless he is shewn to have acted mala fide, will not be affected, though it is shewn that with better management the estate might have been kept free from debt."¹

Prosunno Kumari Debya² laid down the guide lines about when and under what circumstances a shebait is permitted to pledge the deity's property. In so far as the administration of a debutter, especially the authority of a shebait to alienate the endowed property is concerned, the decision in the Privy Council case is unquestionably a pioneer one. It must be asserted, before we go further, that no one can mortgage an estate unless the latter is capable of being permanently alienated.

Again the ruling that the power of a shebait to borrow money or "to incur debts must be measured by an existing necessity..."³, was explained by the Privy Council in Niladri Sahu v. Mahant Chaturbhuj Das⁴ where the

(continued from previous page)

that a manager may alienate the family property for minors as well as major members (subject to the consent of the latter) speaks of the necessities arising from distress, the benefit of the family, and religious purposes! This is a wider power, not ultimately directed to the interests of minors, but concerned to enable a joint-family to be a viable social and economic unit. It is a wider power than that stated by Knight Bruce, L.J., and it is clear he, and his fellow Privy Councillors, did not have that passage in mind... No one can suggest that the rule has been calamitous, or misconceived. It has worked very well. It was not a direct importation from London. Whence did it come then?

"...Some of my readers will be astonished at my reply. This is Roman law". See pp. 428-429.

1. (1854-57) 6 MIA 393, 423-424. 2. (1874-75) 2 IA 145.
3. Prosunno Kumari Debya v. Golab Chand Baboo (1874-75) 2 IA 245, 151.
4. (1925-26) 53 IA 253.

mahant mortgaged debutter properties to raise the money for paying the debts already incurred by him for the construction of a lodging house. In that case it was held that "it was the immediate cause not the remote cause, the causa causans, of the borrowing which was to be considered. The immediate cause of the borrowing was the math's need of money to carry on and pay for its services".¹

It is now a well settled law that in the course of his administration of a debutter a shebait is entitled to alienate property for the benefit and the preservation of the endowment itself. Innumerable decisions² have been made to that effect.

In Prasanna Kumar v. Sri Jagannath,³ the Full Bench of the Orissa High Court, dealing with the interpretations of different phrases of the Orissa Hindu Religious Endowments Act, 1952 (Act 2 of 1952),⁴ held that "It is well settled that a permanent lease of temple land at a fixed rent or rent-free for a premium whether the lands are agricultural or building site is valid only if made for the necessity of the institution".⁵ Referring to

1. Per Lord Atkinson (1925-26) 53 IA 253, 267.

2. For example, Prasanna Kumar v. Sri Jagannath AIR 1971 Ori 246, (FB), 254, G.V. Kalmath v. Vishnu Dev AIR 1973 Mys 207, 210-211, Sridhar v. Shri Jagan Nath Temple AIR 1976 SC 1860, 1886. But see Phani Bhusan v. Kenaram Bhuniya AIR 1980 Cal 255, 258 where the High Court referred to Hunoomanpersaud's case (1854-57) 6 M IA 393, to justify its ruling that legal necessity was not required in case of alienation of partial debutter. It is surprising to note that it has not mentioned Prosunno Kumari's case (1874-75) 2 IA 145. Earlier the same Court in Offl. Receiver v. Iswar Baldev Jiu, AIR 1963 Cal 647, 662, referred to the same Privy Council case only to hold that alienation of debutter was not permissible in absence of unavoidable necessity. In that case (at p.662), Mallick J. observed that "Ever since Hunoomanpersaud's case reported in 6 Moo Ind App 393 (PC), the courts have held that a manager of an infant's or debutter estate has no power to alienate minor's property or debutter property 'except in the need or the benefit of the estate'." - the least informed ruling I have come across in my research. A judge sitting in a Bench of the High Court dealing with a case of Hindu religious endowment is assumed to know that in the circumstances concerned it is the reference to the decision in Prosunno Kumari's case (1874-75) 2 IA 145, but not to that in Hunoomanpersaud's case, I(1854-57) 6 MIA 393 which is indispensable.

3. AIR 1971 Ori 246 (FB).

4. Now superseded by the Orissa Hindu Religious Endowments Act, 1969 (Orissa Act 2 of 1970).

5. AIR 1971 Ori 246 (FB), 254.

Palaniappa Chetty v. Deivasikamony Pandara¹ the Full Bench also pointed out² that in the absence of necessity permanent alienation of debutter property is not permitted even if it is sanctioned by custom or the practice of the institution!

It is interesting to note that in case of necessity the shebait is held to be entitled to alienate debutter property even if there is a condition in a deed of dedication that he shall not alienate or encumber the debutter property. Thus in Ramchandraji Maharaj v. Lalji Singh³ where the deed in question imposed a limitation on the power of the shebait (mahant) to dispose of the debutter properties and where some debutter properties were disposed of by the shebait on a perpetual lease for meeting pressing necessity, holding the alienation of the suit properties as valid Kanhaiya Singh, J. pronounced for the Patna High Court that "It is well settled law that a mahant or shebait has power to incur debts and alienate the dedicated property either by sale or mortgage"⁴ in case of need or for the benefit of the estate. "It is therefore, recognised that for unavoidable necessity the mahant or the shebait in charge of the property for the time being can create even a permanent lease of the debutter property."⁵

But it may be pointed out that a shebait's alienation of debutter property without any legal necessity is not void but it holds good as long as he is alive or holds the shebaiti.⁶ In Abhiram Goswami v. Shyama Charan Nandi⁷ where the mahant claiming the debutter to be his own property granted permanent leases of substantial portion of the debutter

1. AIR 1917 PC 33 = (1916-17) 44 IA 147.

2. AIR 1971 Ori 246 (FB), 254.

3. AIR 1959 Pat 305.

4. Ibid., p. 309.

5. Ibid., p. 309.

6. Vidya Varuthi v. Balusami Ayyar (1920-21) 48 IA 304, 327; Ponnambala v. Periyanan AIR 1936 PC 183, 186, Derrett, IMHL 501, B.K. Mukherjea, op.cit., 4th ed. 279.

7. (1908-9) 36 IA 148 *supra*, p.

without any legal necessity, the Privy Council held that "the leases ... were valid only during the lifetime of the mahant by whom they were granted..."¹ The same principle was reiterated and laid down in Ram Charan v. Naurangilal² where the question for determination was whether the plaintiff's suit was barred by limitation. Lord Russell pronounced for the Privy Council that "a mahant has power (apart from any question of necessity) to create an interest in property appertaining to the mutt which will continue during his own life, or to put it perhaps more accurately, which will continue during the tenure of office of mahant of the mutt".³

Unless a grant of permanent lease of a debutter property by a shebait is made for unavoidable necessity, the act of the shebait will be held as a breach of duty on his part. Thus in Palaniappa Chetty v. Deivasikamony Pandara,⁴ Atkinson, J. held that "it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debutter lands at a fixed rent...."⁵ For granting a lease of debutter lands in perpetuity at a fixed rent by a shebait, "however adequate that rent may be at the time of granting", will deprive the endowment "of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased."⁶ An alienation of a debutter will not be valid beyond the

1. (1908-9) 36 IA 148, 167.

2. AIR 1933 PC 75 = (1932-33) 60 IA 124.

3. AIR 1933 PC 75, 77. The same view was held by the Privy Council in Mahadeo Prasad Singh v. Karia Bharti (1934-35) 62 IA 47, 52-53, which was related to a village forming a part of a debutter estate.

4. (1916-17) 44 IA 147.

5. Ibid., pp. 155-156.

6. (1916-17) 44 IA 147, 156. This ruling was based on the observation of Lord Chelmsford (quoted above p. 266) in Maharanee Shibessouree's case (1869-70) 13 MIA, 270, 275.

life of the shebait unless it is made of unavoidable necessity.¹

However, if the validity of an alienation is called into question after a long period from the alienation, the Court will assume that the alienation was made for legal necessity. In Iswar Gopal v. Pratapmal Bagaria² where the suit was concerned with the estate of a deity installed at Chinsurah in West Bengal, Fazl Ali, J. observed for the Supreme Court that

"It is now well settled that where the validity of a permanent lease is called in question a long time after the grant, although it is not possible to ascertain fully what the circumstances were in which it was made, the Court should assume that the grant was made for necessity so as to be valid beyond the life of the grantor".³

An alienation of debutter property on a permanent basis is not valid beyond the tenure of the office of a shebait unless it is of legal necessity.⁴

Yet alienations by a permanent lease made without legal necessity or benefit of the deity or foundation itself may give valid title to the lessee by adverse possession.⁵

An alienation of a debutter property by a sale or by a permanent lease is governed by the same rule⁶ in the sense that to make it binding on

1. Chocklingham Pillai v. Mayandi Chettiar ILR (1896) 19 Mad 485; Bawa Magniram v. Kasturbai AIR 1922 PC 163, 165; Iswar Gopal v Pratapmal Bagaria AIR 1951 SC 214, 216.

2. AIR 1951 SC 214.

3. Ibid., p. 216.

4. Ram Charan v. Naurangilal (1932-33) 60 IA 124, 130 = AIR 1933 PC 75, 77.

5. Mahadeo Prasad Singh v. Karia Bharti (1934-35) 62 IA 47, 53; Ponnambala v. Periyanan AIR 1936 PC 183, 186-188; Derrett, IMHL 501-502.

6. In Ram Charan v. Naurangi Lal, AIR 1933 PC 75, Lord Russell (at p.78), referring to his own observation that "a mahant is at liberty to dispose of the property of a mutt during the period of his life and that a grant purporting to be for a longer period is good to the extent of the mahant's life interest..." held that "the statement is in no way confined to the grant of a lease, but covers the case of a purported out and out grant of the property"

the endowment, unavoidable necessity must be proved¹ and the onus of proving such necessity or justifying such alienation lies with the alienee.²

Now any decree of judgement passed against a shebait binds not only the shebait for the time being but also his successors.³ In Prosunno Kumari's case⁴ the Judicial Committee laid down the law that "judgements obtained against a former shebait in respect of debts so incurred should be binding upon successive shebait, who, in fact, form a continuing representation of the idol's property."⁵

Moreover, a shebait has power to compromise inherent in his right as a manager⁶ of the deity and he "may validly enter into a compromise which will bind the deity without the prior consent of the Court",⁷ but that compromise must be beneficial not prejudicial to the interests of the deity.⁸ A decree based on a compromise is binding on the endowment⁹ and the succeeding shebait are also bound by the same decree.¹⁰

Though a shebait is entitled to do whatever is necessary for the benefit or the preservation of the debutter, he "may not undertake anything with regard to the endowment which is speculative."¹¹ In Manohar Das v. Tarini

1. B.K. Mukherjea, op. cit., 4th ed. 292.

2. G.V. Kalmath v. Vishnu Dev AIR 1973, Mys 207, 211; Vijay Chand v. Thakurji Radha Krishna AIR 1979 NOC 154 (All).

3. Derrett, IMHL, 501; B.K. Mukherjea, 4th ed., 273.

4. (1874-75) 2 IA 145.

5. Per Sir Montague Smith, ibid., p.152.

6. B.K. Mukherjea, op. cit., 4th ed., 274.

7. Derrett, IMHL, 501.

8. Sri Ram v. Chandeswar Prasad AIR 1952 Pat 438, 444.

9. Sudhindra v. Budan ILR (1885) 9 Mad 80, 83; Chintaman Vithoba v. Chintaman Bajaji ILR (1898) 22 Bom 475, 481; Manikka Vasaka v. Balagopalakrishna ILR (1906) 29 Mad 553, 555.

10. Hossein Ali v. Mahanta Bhagaban ILR (1907) 34 Cal 249, 256.

11. Derrett, IMHL 501. On this point see also B.K. Mukherjea, op. cit., 4th ed., 280.

Charan,¹ a case where the mahant alienated the debutter property by way of lease which, though it was done without necessity, resulted in profit to the debutter as a whole, Graham, J. pronounced for the Calcutta High Court that the expression "benefit to the deity" "must be interpreted in its special meaning and cannot be construed in such a way as to cover any and every contract or lease which may bring some sort of financial benefit to the estate".²

At this juncture, it might be interjected that there is a judicial divergence in opinion regarding the issue whether unproductive or unmanageable debutter properties could be disposed of by the shebait without any legal necessity. In Baidyanath Prasad v. Kunja Kumar,³ where the shebait sold a debutter land situated at a distant place which could not be looked after properly and did not yield any reasonable profit, Narayan, J. referring inter alia to two Allahabad cases⁴ held that the phrase 'benefit to the deity' "may be held to apply to such a transaction as the sale of inconveniently situated, encumbered and unprofitable property, and the purchase in its stead of other property was undeniably a sound investment."⁵ But Derrett comments on the decision of the Patna High Court that "The Court has, in any case, no jurisdiction to enlarge the shebait's powers at Hindu law - there is no analogy with the manager of a minor's estate in this instance..."⁶

But the view of Page, J. that "the shebait's power's of alienation must be exercised for purposes of defence and not of aggrandisement; as

1. (1929-30) 34 CWN 135.

2. Ibid., p. 137.

3. AIR 1949 Pat 75.

4. Jado Singh v. Nathu Singh AIR 1926 All 511 and Jagat Narain v. Mathura Das AIR 1928 All 454 (FB). The analogy was the power of a manager of a joint Hindu family.

5. AIR 1949 Pat 75, 76.

6. IMHL, 502.

a shield not as a sword"¹ seems to have been accepted in Laxmidas Mathuradas v. Jitendra Mullick² where the shebait's purporting to sell a certain debutter property entered into an agreement with the would-be buyer. Harris, C.J., discussing different cases where the phrase "for the benefit of the estate" was dealt with, did not accept the wider meaning given to the phrase in Hossein Ali Khan's³ and Krishna Chandra's⁴ cases. Accepting the restricted meaning of the phrase and referring inter alia to Raghumani Roy v. Bibhuti Bhusan Roy⁵ and the Privy Council case of Raja Kandukuri v. Gade Subbaya⁶ where the phrase, "for the benefit of the estate" has been given meaning synonymously with the meaning of the phrase "legal necessity" and as alternative to legal necessity respectively, held that "It is not enough to show that as a result of the transaction the vendors might receive a somewhat larger income".⁷ The same principle was reiterated by the Bombay High Court in Chintaman v. Narayan Maharaj⁸ where the founder of a religious institution borrowed a large amount of money with the intention of establishing a permanent source of income of the institution in question. It was held that the power of a shebait to render liable the estate for the institution "can only be exercised for protective purposes and not for enhancing the estate of the institution".⁹ There is thus a clear distinction between the powers of a shebait and those of a manager of a joint Hindu family, who has a greater power of initiative.¹⁰

1. Nagendra v. Rabindra AIR 1926 Cal 490, 501.

2. ILR (1952) 2 Cal 352.

3. ILR (1907) 34 Cal 249.

4. (1915-16) 20 CWN 645.

5. AIR 1936 Cal 256 = (1936) 64 CLJ 65.

6. (1936-37) 41 CWN 18 (PC).

7. ILR (1952) 2 Cal 352, 357.

8. AIR 1956 Bom 553.

9. Ibid., p. 555.

10. For a detailed discussion on the subject see below, section 2 of the next chapter.

It is submitted that the expression "benefit of the estate" should be given a restricted meaning, in the sense that unless there is unavoidable or imperative necessity for disposing of debutter property the Court should not allow an alienation as a valid transaction. For there will not be any want of showing so-called grounds of necessity to justify an alienation of a debutter property for the material benefits of the manager. It is suggested that strict adherence to restricted meanings to the phrases of "the benefit of the deity" and "unavoidable necessity" must be maintained. If the Court becomes too liberal in this respect then the shebait in collusion with a third party may dispose of the debutter property with the pretext of legal necessity or benefit of the deity at a price much lower than the market price of the property. In Behari Lal v. Radha Ballabhji¹ the contention of the defendant was that the suit property (a house) was in a dilapidated condition and it was sold for the benefit of the deity of the estate. But in fact the property was not in a dilapidated condition; it needed only repairs. The disputed property was sold by the shebait at far below its market price. The Allahabad High Court did not hold the transaction as valid. It might be pointed out that there was a strong possibility that in the aforesaid case the shebait might have colluded with the buyer to see the transaction go through on a so-called ground of benefit of the deity.

1. AIR 1961 All 73. Similar rules are well understood in reference to the manager's power of alienation of joint family property. See Ram Charan Lonia v. Bhagwan Das Maheshri (1925-26) 53 IA 142 where the Privy Council remarked obiter that in the case of joint family property the manager could alienate the entire immovable property for necessity "provided (that) the property was not sacrificed for an inadequate price..." p. 146. Therefore adequacy of consideration is an important element in respect of a manager's alienation of joint family property. See also Kailash Nath v. Tulshi Ram ILR (1946) All 457, 460; Dudh Nath v. Sat Narain Ram AIR 1966 All 315 (FB), 316; Durga Prasad Bhagat v. Marchia Bewa (1967) 33 CIT 628, 635-636; Gopalakrishnan v. Balasubramania Chettiar (1969) 1 MLJ 537, 540.

It may be noted that we have seen cases of illusory endowments but the Allahabad case is not a case of illusory endowment but it was an illusory transaction in respect of a valid endowment representing possibly a large number of cases which do not come to the Courts and find their way into law reports, and so escape our notice.

Alienation of the whole of an endowment

In this context it must be added that though a shebait is entitled to sell debutter property or to alienate it by a permanent lease, his power to sell or dispose of such property is limited in the sense that he is never entitled to dispose of the whole of the endowed property. He can only alienate certain items of an endowment.¹ An alienation of the whole of an endowed property is void.² In Ram Charan v. Naurangilal³ where the issue to be determined was whether the suit was barred by limitation, Lord Russell of Killowen pronounced for the Privy Council on the point at issue unambiguously that

"Their Lordships...must point out that the cases in Gnanasambanda Pandara v. Velu Pandaram... and Damodar Das v. Lakhon Das... were both of them cases in which the assignment or the disposition consisted of an assignment or disposition of the mutt and its properties. Such an assignment was void and would in law pass no title, with the result that the possession of the assignee was perforce adverse from the moment of the attempted assignment..."⁴

In Ram Charan's case⁵ the subject-matter was related not to the whole of the endowment as in Gnanasambanda's⁶ and Damodar's⁷ cases but the Privy Council has been clear in its exposition of the law at issue.

Though some items of a debutter may be disposed of on the grounds of

1. B.K. Mukherjea, op.cit. 4th ed., 279.

2. Gnanasambanda Pandara v. Velu Pandaram (1899-1900) 27 IA 69, 76; Damodar Das v. Lakhon Das (1909-10) 37 IA 247, 151; Ram Charan v. Naurangi Lal AIR 1933, PC 75, 77; Bairagi Das v. Udaï Chandra AIR 1965 Ori 201, 203.

3. AIR 1933 PC 75.

4. Ibid., p. 77.

5. AIR 1933 PC 75.

6. (1899-1900) 27 IA 69.

7. (1909-10) 37 IA 247.

necessity and benefit of the deity, items like idols¹ and a temple can never be transferred for pecuniary considerations even on the grounds legal necessity.²

In Panna Banerjee v. Kali Kinkor³ it was observed that

"An idol can never be the subject-matter of commerce. The sale of an idol is prohibited by Hindu law... A deity is not a chattel but a juridical person. No custom can ever validate a sale of any deity. The legal necessity of the deity cannot destroy the very existence of the deity by selling it in the open market... It is against public policy... It is so repulsive to the judicial mind that every Court is bound to strike it down in limine."⁴

In Mukundji Mahraj v. Persotam Lalji⁵ the property in dispute was half of the temple with the installed deity in it, which was bought at auction by one Goswami Purushottam Lalji. Agarwala, J. of the Allahabad High Court observed that "a temple cannot be sold in execution of a decree obtained by a creditor on the basis of a loan taken by a mahant even if it be for legal necessity".⁶ The credit of the deity is obviously vitally affected by the law thus stated.

Now, the decision in the above Calcutta case was affirmed on appeal by the Supreme Court in Kali Kinkor v. Panna Banerjee,⁷ where Ray, C.J. delivering the judgement of the Supreme Court pronounced inter alia that the transfer of either a temple or the deity "by sale is void in its inception".⁸

1. Khetter Chunder v. Haridas ILR (1890) 17 Cal 557, where it was held that "the Hindu law prohibits the sale of an idol" - 559 Bairagi v. Uday AIR 1965 Ori 201, 205; Panna Banerjee v. Kali Kinkor AIR 1974 Cal 126, 139.

2. Mukundji Mahraj v. Persotam Lalji AIR 1957 All 77, 80.

3. AIR 1974 Cal 126.

4. Per Deb, J. Ibid p.139. 'Selling the deity' is a picturesque expression not of course to be taken literally.

5. AIR 1957 All 77 = ILR (1956) 1 All 421.

6. AIR 1957 All 77, 80 (my emphasis). Referring to the decision in the Allahabad case Derrett comments that "it was urged with great plausibility that even for legal necessity, for example to pay debts binding upon the idol it was legally impossible for the temple itself to be sold" - IMHL, 502.

7. AIR 1974 SC 1932. Supra, p. 249.

8. Ibid., p. 1936.

It is true that the law prohibits alienation of idols or a temple by any means and the idol cannot be sold as a chattel. But can such a law stop an idol being sold as a chattel? As long as the present Indian law of limitation¹ is applicable to the case of a debutter specially to all cases of private debutter; my answer is no. An acquirer of an idol by adverse possession may gain a valid title of ownership of a consecrated idol by a lapse of certain period as provided in the Limitation Law; the idol becoming a secular property of the possessor may be treated as a chattel. It is urged that in case of a debutter the Law of Limitation should not be applied and a new law incorporating the ancient rule that "the property of gods could never be acquired by lapse of time"² should be introduced and applied. There is, of course, no perfect precedent for this in the personal laws of modern South Asia.

b. Alienation as a Result of Shebait's Execution of Promissory Notes

The law is unquestionably settled that a shebait or all co-shebait together have the power to charge, mortgage, even sell the property of the idol or to dispose of any income of the debutter for the benefit or the necessity of the deity,³ but the law is not at all clear whether the shebait is empowered to borrow money for the necessity of the idol by executing promissory notes and in this respect if we are to go by the latest decision⁴ on the subject then the law is that he is not entitled to do so.

In V.K. Kombi Achan v. C.K. Chidambara Iyer⁵ a trustee of a temple

1. The present law is provided by the Limitation Act, 1963 (Act 36 of 1963). Relevant sections for our purpose are Secs. 92-96. See below, Appendix IIA.

2. Derrett, Critique, 378.

3. Derrett, IMHL, 501.

4. V.K. Kombi Achan v. C.K. Chidambara Iyer, 1966 KLT 597.

5. Ibid.

the Viswanathaswami Temple, executed a promissory note for its purpose.¹ Following the decisions in Palaniappa Chettiar v. Shanmugam Chettiar² a case where a trustee executed a promissory note purporting to bind a fund of a charitable character, Swaminatha Aiyar v. Srinivasa Aiyar³ in which a trustee executed a promissory note on his personal credit for debts for the purposes of a trust and Rama Variar v. Ananthanarayana Pattar,⁴ a case where urallars (managers) of a devaswom borrowed money executing promissory notes for a proper and necessary purpose of the foundation the Kerala High Court ruled that a trustee of a temple could not bind the idol by executing a promissory note incurring a debt for the necessity of the idol.⁵ The Kerala High Court also accepted the view that an idol was a permanent minor. Mr. Justice Madhavan Nair delivering the judgement of the Court ruled on the issue in question that

"The law appears well settled that in a suit on a promissory note executed by the guardian of a minor the latter's estate cannot be made liable, and that the consecrated idol in a temple being for legal purposes, a permanent minor (vide 4 IA 52) the same principle applies to a promissory note executed by its trustee".⁶

It is rightly pointed out by Derrett that the cited case of Konwur Door-ganath Roy v. Ram Chunder Sen (1876) 4 IA 52, in the said observation of Nair, J.,

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1. See the illuminating critique of Derrett on the case in "Promissory Notes executed by Shebait" in 1966 KLT Jnl 101-104. In that article Derrett enquires why the textbook writers like Mayne, Mulla, Mukherjea, Gupte, Gour and Raghavachariar did not deal with the topic at issue and the cases dealing with a shebait's power of borrowing money by executing promissory notes. The learned author himself finds out the answer for all of us when he points out that "The answer is simple. People tend to divide up the topics of law with mental scissors. These cases fall under the law of negotiable instruments and will be found mentioned in treatises on that subject. Since they fall on that side of the line and headnotes and indexes index them under that heading it does not occur to any writer on Hindu law to use them". See p. 103.
 2. ILR (1918) 41 Mad 815.
 3. (1916) 32 MLJ 259.
 4. (1950) 2 MLJ 636.
 5. See on this point Derrett, "Promissory Notes...", op.cit., 101-102.
 6. 1966 KLT 597, 597.

"Laid down nothing of the kind and was not concerned with a promissory note. What was observed in that case (at p.64) as has been in many another case dealing with religious endowments, namely that as regards the powers of the shebait to bind the idol by his alienations he may be regarded as limited analogously with the manager for an infant heir, so that the rule in Hunoomanpersaud Panday v. Mussamut Babooee 6 MIA 423 is applicable to alienations by a trustee of a temple (Prosunno Kumari v. Golab Chand 2 IA 151). This rule, which is notorious, does not amount to a proposition that the idol is a minor".¹

Similarly Mukherjea² also expresses categorically that a Hindu idol is not a perpetual minor. In support of the view that an idol is not a permanent minor the learned author cited³ Surendrakrishna v. Shree Shree Bhubaneswari ILR (1933) 60 Cal 54, where it was observed⁴ referring to the doctrine that an idol was a perpetual minor, that it was an extravagant theory contrary to the judgement of the Privy Council in cases like Damodar Das v. Lakhan Das.⁵

Again Ameer Ali, J. dealt specifically with the point of analogy between the deity and a minor in Ananta Krishna Shastri v. Prayag Das.⁶ His Lordship pronounced that

"To my way of thinking, their nature is essentially different. Their practical incidents differ, for instance, in the case of a minor he is being protected and his properties saved so that he can enjoy it to the full upon attaining majority. In the case of a deity no such thing can happen: he is a major, he is born major, there is no future time at which he becomes major and then enjoys the property. He is not incapable. He is under no inherent disability... On the other hand he is all powerful. He owns property but for quasi-physical reasons cannot make his own contracts. Therefore, he has to make contracts through a human agency".⁷

So it is obvious that in the presence of so many authorities cited above

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1. Derrett, "Promissory Notes...", op.cit., 101-102. Emphasis provided.
 2. Ibid., 102 where he quoted B.K. Mukherjea on the point extensively.
 3. B.K. Mukherjea, op.cit., 4th ed. 256.
 4. ILR (1933) 60 Cal 54, 73.
 5. (1909-10) 37 IA 147.
 6. ILR (1937) 1 Cal 84.
 7. Ibid., p. 97.

the rule laid down by the Kerala High Court in V.K. Kombi Achan's case¹ that a Hindu idol was a minor, is wrong. But the actual decision in the case that a trustee could not bind the idol by executing a promissory note incurring debts for the purpose of the idol seems to be correct in the sense that they are supported by previous decisions. Whether the rule itself is correct may be tested when we examine those decisions evolving and accepting the rule that a shebait could not bind the debutter executing a promissory note.

Let us consider first Swaminatha Aiyar's case.² Rahim and Spencer J.J. following three cases,³ two of which were English cases which had nothing to do with Hindu religious endowments, came to the conclusion that a trustee could not bind the debutter if he borrowed money executing a promissory note for the purpose of the endowment itself. Their Lordships referred to a Calcutta case⁴ which was ironically related to a hotel under a trust and in the Calcutta case the judgement debtor was a trustee of a hotel called the Adelphi Hotel. They did not accept the authority of the Hindu law specially related to the point at issue based on a decision in a case of Hindu religious endowment in spite of the fact that they discussed the case.⁵ The case was Shrimat Daivasikamani v. Noor Mahamad Rowtham.⁶ It was not related to any debt of a shebait of a Hindu religious endowment; it nevertheless laid down the rule that debts contracted by the head of a math for the purposes of the math would bind the math. A decree regarding such debts might be passed against the succeeding head charging the income of the debutter in spite of the fact that such debts were not charged on the income of the math.

1. 1966 KLT 597.

2. (1917) 32 MLJ 259.

3. Strictland v. Symons (1884) 26 Ch.D 245, In the matter of Johnson, Shearman v. Robertson (1880) 15 Ch.D. 548 and In the matter of M.A. Shard ILR (1901) 28 Cal 574.

4. In the matter of M.A. Shard ILR (1901) 28 Cal 574.

5. See (1917) 32 MLJ 259, 261-262. 6. ILR (1908) 31 Mad 47.

In Palaniappa Chettiar v. Shamnugam Chettiar,¹ in laying down the rule that a trustee of a temple or a charity drawing a hundi or a promissory note or a bill of exchange could not bind the religious or charitable institution even in respect of debts incurred for the purposes of an institution, the Madras High Court applied the rule of English law about bills made by churchwardens, overseers and others in their official capacities.² Wallis C.J. came to his conclusion only when in the facts of the case nothing was found to justify that the trustee "intended to draw the hundi on behalf of any body else."³ So Palaniappa⁴ cannot be the authority for the proposition that the act of a trustee borrowing money by executing a promissory note for the purposes of the religious foundation could not bind the foundation. In that case it was not proved that the borrowed money in question was actually spent for the purposes of the endowment.

Now, the decision in Rama Variar v. Ananthanarayana Pattar⁵ was not correct because it was based on the decisions in Palaniappa⁶ and Swaminatha's⁷ cases and neither of those cases, as we have seen, can be relied on for the proposition that a trustee could not bind the deity by executing a promissory note borrowing money for the purposes of the deity.

But many cases dealing with a shebait's power to borrow money by executing a promissory note or bills for the purposes of the deity in effect laid down the rule, which, it may be submitted, is a correct one - that a shebait could bind the idol for the debts incurred for the idol's purposes by executing a promissory note.

1. ILR (1918) 41 Mad 815.

2. Ibid, pp.820-821 where Wallis, C.J. referred to and quoted from Byles on Bills, 16th ed., p. 86.

3. ILR (1918) 41 Mad 815, 821.

4. Ibid.

5. (1950) 2 MLJ 636.

6. ILR (1918) 41 Mad 815.

7. (1916) 32 MLJ 259.

In Laksmindratheertha v. Raghavendra Row,¹ the head of a math incurred debt borrowing money for the necessary purposes of the math. Sadasiva Ayyar, and Spencer, J.J. held that the head of a math incurring debts for the purposes of the math bound the math property. A suit to recover money could be brought during the lifetime of the incumbent or against his successor. Sadasiva Ayyar J also pointed out a distinction between a sannyasi head of a math and a lay trustee of a charitable or religious foundation. In his opinion an analogy could not be drawn between a head of a mutt and an administrator or a lay trustee of a religious or charitable institution.² Referring inter alia to Shankar Bharati Svami v. Venkapa Naik³ where it was observed that a head of a math might presumably have no private property and must be presumed to pledge the credit of the math when incurring debts he incurred for the purposes of the math, Sadasiva Ayyar, J. pronounced that

"I am clear that a Hindu Sanyasi has no personal credit whatever of a monetary or proprietary character, and that it is a contradiction in terms to state that any loan was made to a sanyasi on his personal credit. I would therefore hold that Swaminatha Aiyar... and the other cases referred to, do not apply when the question of the liability of the mutt or other institution for the debt incurred by a Sanyasi as head of the institution comes into question."⁴

In his judgement in the same Madras case, Spencer J. referred inter alia to Daivasikamani v. Noor Mahamad⁵ and approved it and ruled that in all the cases "in which the head of a math, either directly or by implication, pledged the credit of the math in incurring debts for purposes necessary for the maintenance of the institution... (,) there is no presumption that the head of the mutt... intended to make himself

1. ILR (1920) 43 Mad 795.

2. ILR (1920) 43 Mad 795, 798.

3. ILR (1885) 9 Bom 422.

4. ILR (1920) 43 Mad 795, 799.

5. ILR (1908) 31 Mad 47. See above, this section.

personally liable".¹

But Sadasiva Ayyar, J.'s comments on the decisions in Swaminatha Aiyar v. Srinivasa Aiyar,² Chidambaran Pillai v. Veerappa Chettiar³ and Parvathi Ammal v. Namagiri Ammal⁴ are the most revealing ones on the issue in question. His Lordship observed that

"The principle underlying these decisions is that such a trustee, or other person in the position of a trustee, has got his personal credit to pledge and the presumption should be that when he incurred a debt without charging the trust properties, the creditor lent the money on such personal credit and could look to that credit alone and to the principle of subrogation for recovery of his loan".⁵

It may be interjected here that there must be a distinction drawn between a lay trustee and a shebait - between a trustee of a hotel as we have seen in the Calcutta case and a trustee of a religious endowment dedicated to a deity.

Moreover, in Niladri Sahu v. Mahant Chaturbhuj Das⁶ where the mahant borrowed money from moneylenders on notes of hand not for the necessary purpose of the math and Vibhuda Priya v. Laksmindra⁷ where the mahant borrowed money for the benefit of the math, the Privy Council laid down the rule that a decree could be passed to realize in discharge of debts, incurred for the purposes of the math, the beneficial interest of the mahant in the endowed property, and the decree would bind the succeeding mahant as well. Relying on the said Privy Council decisions the Madras High Court held in Venkatabalagurumurthi Chettiar v. Balakrishna Odayar⁸ that the creditor was entitled to recover the value of goods from the assets of the temple when goods were bought by the trustee for the purposes of the temple.

1. ILR (1920) 43 Mad 795, 799.

2. (1917) 32 MLJ 259, cited above in this section.

3. (1917) 6 LW 640 as cited at 798 of ILR (1920) 43 Mad 795.

4. (1917) 6 LW 722 as cited at 798 of ILR (1920) 43 Mad 795.

5. ILR (1920) 43 Mad 795, 798.

6. (1925-26) 53 IA 253.

7. (1926-27) 54 IA 228.

8. (1931) 60 MLJ 90, 96.

In Sudaresan Chetty v. Viswanatha Pandarasamadhi,¹ Krishnan, J. on the finding that the trustees of the temple in question had agreed to repay the loan out of the temple funds which was borrowed for temple purposes, granted a decree charging the funds of the temple.² In that case, the trustee of a temple borrowed money on a bond for the purposes of the temple in question. In this context it may be pointed out that his Lordship not only granted a decree charging the funds of the temple but also laid down the general rule that where a trustee borrowed money for the purposes of a temple without charging the funds of the institution expressly, a decree could be granted to the creditor charging the funds of the institution. Thus His Lordship ruled that "Turning now to the main question argued, whether in the absence of an express charge on the temple properties a decree could be given against temple properties or the like, "it seems to me the learned District Judge's view that it could not be given is not correct on the facts of the case".³

But in this context Manikka Vasaka Desikar v. Balagopalakrishna Chetty⁴ is in point. In that case the head of a math purchased goods for the necessary purposes of the math by executing a promissory note. Following the decision in Sudindra v. Budan⁵ which was based on the decision in Prosunno Kumari Debya's case⁶ the Madras High Court, in spite of the fact that the head of the math against whom the decree was passed for the recovery of the money gave up his position of the head, held that

"a decree passed against the trustee of a mutt is binding on his successor upon whom lies the onus of coming forward and taking steps to set aside a decree, which as it stands is binding upon the mutt as represented by him, and that in execution proceedings he cannot be allowed to dispute the correctness of the decree".⁷

1. (1922) 43 MLJ 147.

2. Ibid., p. 152.

3. Ibid., p. 149.

4. ILR (1906) 29 Mad 553.

5. ILR (1885) 9 Mad 80.

6. (1874-75) 2 IA 145. Supra, p. 270.

7. ILR (1906) 29 Mad 553, 555.

It is submitted that the above ruling of the Madras High Court should be the law relating to the cases where shebaita borrow money by executing promissory notes for the purposes or the benefit of the deity. Moreover, it must be pointed out that in the presence of a ruling, as laid down in Manikka Vasaka's¹ case the later decisions of the Madras or any other High Court should not have departed from the law on the subject at issue. V.K. Kombi Achan v. Chidambaran Iyer² or Palaniappa Chettiar v. Shamnugam Chettiar³ must not be taken as authorities on the point at issue because of their wrong basis, as shown above.

On the merits of the matter, if a debutter can be alienated for the necessity of the deity by way of sale, mortgage or permanent lease, then there should not be any bar for a shebait to borrow money by executing a promissory note for the benefit of the deity. Again, it may be pointed out that dealings of secular properties of minors by their managers or guardians cannot be compared to the dealings of shebaita and debutter properties. A shebait like a manager of an infant estate is empowered to do whatever is necessary for the preservation of the endowment but his power to deal with the debutter is not the same as that of a manager of an infant estate and the Privy Council in formulating the rule in Prosunno Kumari's case⁴ never held like that. It drew a broad analogy between a shebait and a guardian of a minor and this is the only interpretation which may be made from Sir Montague's observation that "It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir".⁵

1. ILR (1906) 29 Mad 553, 555.

2. 1966 KLT 597.

3. ILR (1918) 41 Mad 815.

4. (1874-75) 2 IA 145.

5. (1874-75) 2 IA 145, 152, emphasis provided.

The underlined phrases, "at least to as great a degree as the manager of an infant heir", obviously mean that he has at least the power of a guardian of a minor but in no way do they mean that he has powers equal with those of a guardian of a minor. So, whatever law is applicable to limit the power of guardian of an infant is not necessarily applicable to a shebait of an idol. The representative capacity of a guardian of a minor is contingent and does not pass to his heirs¹ but

the case of a shebait is different because "succeeding shebaites ... form a continuing representation of the idol's property".² And the holder of a promissory note will know that he can sue any of the shebaites either the incumbent or the future one, who form a continuing representation of the debutter and the idol's property will be bound if it is proved that money was borrowed for the purposes of the idol.

In my opinion the restriction which is imposed by law on a manager of an infant estate in relation to his execution of promissory notes for borrowing money for minor's purposes must not be there in case of a shebait of an idol who intends to borrow money by executing promissory notes to save the deity's interests and the money so borrowed by a shebait should be realised from the debutter and if necessary a portion of debutter may be transferred or alienated either by sale or mortgage or lease whichever suits the deity's interests.

It may be argued that it is extremely inconvenient that a promissory note's validity should depend on the contingency of the borrowing having been, at its inception, supported by, e.g. legal necessity. India is, however, familiar with defeasible titles and the proposition is not so wildly anomalous as it appears. Acceptors of such notes must acquaint themselves with the facts or lose their remedy.

1. Derrett, "Promissory Notes...",
op.cit., 101.

2. (1874-75) 2 IA 145, 152.

SECTION 2

SHEBAIT'S DUTY AND RIGHT OF SUIT : MANDAMUS

a. Duties of a shebait

The ownership of a dedicated property belongs to the deity but the deity owns the property only in an ideal sense.¹ The deity by its nature cannot manage its own affairs and its ideal nature is connected with the natural personality of its shebait² who is in charge of the management and in possession of the deity's property.³ But "the duties and privileges of a shebait primarily are those of one who fills a sacred office... The main concern of shebait, therefore, is to duly carry out the sacred duties of his office."⁴

In relation to debutter property a shebait is empowered to discharge his duties in such a way as he thinks proper.⁵ But he "by virtue of his office can never possess adversely to the idol, whatever steps he takes in a manner hostile, it might appear, to the idol's interests".⁶ This disability of a shebait is assumed to exist in any person who stands in a fiduciary relation to others.⁷

In Venkatanarasimha v. Gangamma⁸ where the scheme for the management of a public temple was challenged by the archakas of the temple, Ramaswami, J. held for the Madras High Court that the "principle that a trustee

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1. Prosumro Kumari Debya v. Golab Chand Baboo (1874-75) 2 IA 145, 152.
 2. "An idol can hold property and obviously it can sue and be sued in respect of it. But the idol is the owner of the debutter property only in an ideal sense, its ideal personality is always linked with the natural personality of the shebait." B.K. Mukherjea op.cit., 4th ed., 256.
 3. Jagandindra Nath v. Rani Hemanta Kumari (1903-4) 31 IA 203, 210.
A very important case for the purpose of this section.
 4. Per Page, J. Nagendra v. Rabindra AIR 1926 Cal 490, 495. Supra p. 240.
 5. Jagannath v. Byomkesh AIR 1973 Cal 397, 398.
 6. Derrett, IMHL 503.
 7. B.K. Mukherjea, op.cit., 4th ed., 313.
 8. AIR 1954 Mad 258.

cannot acquire title by adverse possession of the trust property, applies equally to 'quasi' or constructive trustees, the managers of religious endowments and in fact to all persons who stand in a fiduciary relation to others."¹ Again in Sree Sree Ishwari Sridhar Jew v. Sushila Bala² affirming the view held by Rankin, C.J. in Surendra-krishna Roy v. Shree Shree Iswar Bhubaneswari Thakurani³ that there could not be adverse possession of the debutter by any Shebait, Bhagwati, J. held for the Supreme Court that "no shebait can, so long as he continues to be the shebait ever claim adverse possession."⁴ But a stranger, or even the donor, can hold both the idol and the debutter adversely to the deity or the shebait and prevent the shebait from the management and possession of both the deity⁵ and its property.⁶ Under the Limitation Act, 1963 (Act 36 of 1963) he can acquire title to the idol's property, for 'he can prescribe for the estate against the idol itself.'⁷

At present the period of limitation for perfecting title to an endowed property by adverse possession or to recover possession of that property is governed by Articles 92-96 of the Limitation Act.⁸ Whether to perfect

1. AIR 1954 Mad 258, 261.

2. (1954) 5 SCR 407, 417.

3. ILR (1933) 60 Cal 54, 78.

4. (1954) 5 SCR 407, 417.

5. "Adverse possession against the idol in respect of property dedicated can be acquired either by a total stranger or by the donor himself" Varadachari, op.cit., 2nd ed., 303.

6. Derrett, IMHL, 503.

7. Derrett, IMHL, 503. See also Gossamee Sree Greedhareejee v. Rumanlolljee Gossamee (1889) 16 IA 137 as cited by the author, see especially p. 146 of the cited case.

8. See below, Appendix IIA. . . . An elaborate discussion on the subject has been dealt with in Mukherjea's book, 4th edition, pp.298-313. But there are some printing mistakes at p. 312 relating to the limitation period of movable properties. It should be three years, not twelve years as inserted on that page.

title to a debutter in adverse possession or its shebaiti, the limitation period is twelve years. "The idol may lose the whole or a portion of its properties in case its shebait through laches suffers a trespass for more than 12 years."¹ and in these circumstances even the idol itself might get lost.

In Iswari Bhubaneswari Thakurani v. Brojo Nath Roy² the deity lost title to half of its property due to adverse possession for more than twelve years. But in Damodar Das v. Lakhan Das³ the junior chela (disciple) perfected his title by adverse possession not only to the debutter but also to the deity itself.

Even the founder can acquire a good title of a debutter by adverse possession. In Dasami Sahu v. Param Shameswar,⁴ the founder appointed his mother as the shebait of the endowment. Two years after the dedication the founder and his mother revoked the dedication and then the founder treated the property as his own for more than twelve years. Holding that the founder acquired title by adverse possession, the Allahabad High Court held that "the same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself."⁵

It is suggested that a property dedicated in the name of God or in favour of any religious foundation should not be subject to the Law of Limitation. Public sentiments never acquiesce that the ownership of a

1. Varadachari, op.cit., 2nd edn., 303.

2. (1937-38) 64 IA 203, 213-214. The judgement of the Privy Council affirmed the decision of the Calcutta High Court in Surendra Krishna Roy v. Shree Shree Ishwar Bhubaneswari Thakurani, ILR (1933) 60 Cal 54.

3. (1909-10) 37 IA 147, 151.

4. AIR 1929 All 315. The case is cited and discussed at pp. 303-304 of Varadachari's book, 2nd edn., but no critique of the case has been made there.

5. AIR 1929 All 315, 318.

religious property may be taken away because of its adverse possession for a certain period. The deity's property is more vulnerable to adverse possession than a secular property, because it is by its nature incapable of preventing a trespasser, and the law does not protect the deity even if adverse possession is maintained with the collusion of the shebait, as we have seen in the Allahabad case. The present position of law cannot be acceptable by any religious or moral standard and gods' properties must be saved by introducing the ancient rule, as we have already suggested in the previous section, that the title to a debutter could never be acquired by lapse of time.¹ Moreover, the general rule that a debutter property is inalienable sounds ludicrous when we find the effect of limitation on an endowed property in adverse possession. It seems that on one hand we are giving protection to the deity by the rule of inalienability of its property, but on the other hand we are withdrawing that protection by making debutter subject to the law of limitation. The limitation law and the rule of inalienability relating to debutter are a contradiction in terms. This contradiction must be removed by making an exception to the limitation law that a debutter must not be in the purview of the Limitation Act.

Now the duties of a shebait in respect of the idol had been succinctly pointed out by Lord Shaw in Pramatha Nath v. Pradhyumna Kumar² when his Lordship observed for the Judicial Committee that

"It must be remembered in regard to this branch of the law that the duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolising the Divinity, as in the eyes of law a status as a separate persona. The position and rights of the deity must in order to

1. Derrett, Critique, 378. Above, p. 282.

2. AIR 1925 PC 139 = (1924-25) 52 IA 245. Supra p. 138.

work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being. Accordingly, he is the shebait custodian of the idol and manager of its estate."

The duties of a shebait are implied in the rights of the deity as mentioned by Lord Shaw in his observation. So his duties are to get the services of the deity performed, to manage and preserve its property.

b. Shebait's Right of Suit

In the conception of shebaiti two ideas are involved, the shebait is not only the ministrant of the deity, but also the manager of its property.² All the interests of the deity are attended to by the shebait.³ In Pramatha Nath v. Pradhyumna Kumar⁴ Lord Shaw ruled for the Privy Council that a Hindu idol

"has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who in law is its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir."⁵

The same view in different language was expressed by Mr. Ameer Ali in Vidya Varuthi v. Balusami Ayyar⁶ when he observed for the Judicial Committee that "When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency".⁷ Shebait, being the human agent of the deity, is empowered to defend the deity's right on its behalf. Litigations involving a debutter are naturally attended to or dealt with by the shebait whose paramount duty is to see that the deity's interest is not injured.

1. AIR 1925 PC 139, 141.

2. Maynes' Treatise on Hindu Law and Usage, op.cit., 11th ed., 928.

3. Varadachari, op.cit., 297.

4. AIR 1925 PC 139.

5. Ibid., p. 140.

6. AIR 1922 PC 123 = (1920-21) 48 IA 302.

7. AIR 1922 PC 123, 126.

Now the point that a shebait as a manager of the deity and its property is vested with the right of maintaining suits on behalf of an idol, was nowhere dealt with or spelled out as clearly as in Jagadindra Nath Roy v. Rani Hemanta Kumari Debi.¹ In that case Sir Arthur Wilson delivering the Advice of the Judicial Committee pronounced that

"assuming the religious dedication is of strictest character, it still remains that the possession and the management of the dedicated property belong to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property."²

Though an idol is legally capable of holding property, by its very nature it is incapable of protecting its property from the hostile attacks of the litigants. In order to protect the debutter from hostile attacks the law has provided that the shebait is empowered to defend the deity's right to property on its behalf. In Sri Iswar v. Gopinath Das,³ Mallick J. pronounced on the point at issue very clearly that "According to the Hindu law, shebait represents the deity and he alone is competent to institute a suit in the name of the deity."⁴

Now, when there are more than one shebait, all the shebaites form one body in the eye of the law⁵ and they should act together as plaintiffs⁶ in relation to the debutter property when they want to bring a suit to recover possession of the debutter property or to recover money payable to the estate of the deity.⁷

1. (1903-4) 31 IA 203.

2. Ibid., p. 210.

3. AIR 1960 Cal 741.

4. Ibid., 741, 748.

5. Iswar Lakshi Durga v. Surenda (1940-41) 45 CWN 665, 670; Nemai v. Banshidhar AIR 1974 Cal 333, 334 supra p.239; Nandlal v. Kesarlal AIR 1975 Raj 226, 229.

6. Nirmal Chandra v. Jyoti Prosad (1940-41) 45 CWN 709, 715; Sree Sree Sreedhar Jew v. Kanta Mohan (1945-46) 50 CWN 14, 22, Laxman Prosad v. Shrideo 1973 MP LJ 842, cited in Raghavachariar, op.cit., 7th ed. 671.

7. Raghavachariar has made the exposition of the law at issue very clearly when the learned author observes in his book, 7th edition, vol. I, pp. 670-671, that "A plurality of shebaites form one body in the eye of the law. Hence where the plaintiffs, the defendants and the person who made a gift were all co-shebaites of the deities, the right of the plaintiffs to bring a suit challenging the validity of the alienation

"The management may be for practical purposes in the hands of one of the shebait who is called the managing shebait, or the shebait themselves may exercise their right of management by turns; but in neither case is it competent for one of the shebait to do anything in relation to the debutter estate without the concurrence either express or implied of his co-shebait. This is, of course, subject to any express direction given by the grantor."¹

The rule that a majority of the shebait cannot by their act bind the deity or the dissenting minority, was laid down in Man Mohan Das v Janki Prasad.² In that case the deity's property was mortgaged to different persons and the mortgagor was one of the trustees acting as a sole de facto manager. The Privy Council held that even in emergency the execution of the mortgage deed by the acting manager alone "would be ineffective as a valid claim to the suit property."³ In other words, it ruled that the idol was not bound by the mortgage even if the manager acted as sole de facto manager and acted in good faith for the benefit of the deity and its estate. It is suggested that the law should be changed to the effect that in the case of several shebait of an endowment, the shebait in charge of the administration must be entitled to act for the deity's benefit on the deity's behalf even without any express approval of other co-shebait. Otherwise, by the time he gets the consent of other shebait to act for the deity even in a case of emergency, the interests of the idol may have suffered irreparably.

Reverting to the question of a shebait's right of suit, it may be pointed out that Maharaja Jagadindra Nath's case⁴ laid down only the general rule that right to sue on behalf of the debutter is vested in the shebait and the rule is meant only for normal circumstances where the shebait administers

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cannot be questioned. All the shebait must join as plaintiffs when a suit is brought on behalf of a deity either to recover possession held adversely by a stranger, or for recovery of money payable to a debutter."

1. B.K. Mukherjea, op.cit., 4th ed., 251.

2. (1944-45) 49 CWN 195 (PC).

3. Ibid., p. 201.

4. (1903-4) 31 IA 203.

the debutter, looking after the interests of the deity.¹ But when a shebait refuses to bring a suit or precludes himself by his conduct from suing,

"it frequently happens that someone other than the shebait must bring a suit whether in his own name or in the name of the deity, to enforce the deity's rights."²

Jagadindra Nath Roy's case³ is not applicable in such circumstances. In that case the shebait filed the suit for the protection of the deity's interests and the ruling of that case was not meant for cases where the shebait acts adversely to the deity's interests.⁴ In the case of a private Hindu religious endowment the members of the family of the founder are entitled to sue on behalf of the deity.⁵

In Monohar Mookerjee v. Peary Mohan⁶ where the heir of the founder of a private religious endowment on whom the management could devolve in future brought the suit against the existing shebait for his misconduct, Sir Asutosh Mookerjee and Panton, J.J. held that persons interested in the protection of debutter could sue to enforce the rights of the deity. Thus their Lordships pronounced for the Calcutta High Court that

"the founder or his heir may sue for the enforcement of the trust, for the removal of the old trustee, for the appointment of a new one and may thereby secure the proper administration of the trust and its properties."⁷

In both Girish Chandra v. Upendra Nath⁸ and Tarit Bhusan v. Sridhar Salagram⁹ it was held that members of the family of endowment had a right

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1. "The principle in Jagadindra's case applies when there is a shebait actually in office and ready and willing to do all acts necessary for the protection of the deity's interests. In these normal circumstances the deity's right of suit can be said to have for practical purposes no independent existence apart from the rights of shebait, as it is through the shebait alone that the right would be exercised." Mukherjea, op.cit., 4th ed., 258.
 2. Derrett, IMHL, 504.
 3. (1903-4) 31 IA 203.
 4. Biswanath v. Radha Ballabhji AIR 1967 SC 1044; 1046-47. See below, Section 4, for the detailed discussion of the case.
 5. Derrett IMHL, 504; Mukherjea op.cit., 4th ed. 259.
 6. AIR 1920 Cal 210.
 7. Ibid., p.215.
 8. (1930-31) 35 CWN 768, 770.
 9. AIR 1942 Cal 99, 115-116.

to maintain suit on behalf of the deity to protect the deity's interests. But in Sri Iswar v. Gopinath Das¹ it was held that even a stranger with the permission of the court could bring a suit in the name of the deity. This was a significant step forward.

In Ramchand v. Janki Ballabhji² where a pujari-cum-shebait misappropriated temple properties, the Supreme Court ruled that a person contributing a large amount towards the maintenance of a temple had a substantial interest to bring a suit on behalf of the deity for possession of the debutter from mismanagement and misappropriation.³ In Thenappa Chettiar v. Karuppan Chettiar⁴ where the suit was concerned with the settlement of a scheme of a private math, Ramaswami, J. delivering the judgement for the Supreme Court held inter alia that

"If there is a breach of trust or mismanagement on the part of the trustee, a suit can be brought in a civil court by any person interested, for the removal of the trustee and for the proper administration of the endowment..."⁵

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1. AIR 1960 Cal 741, 748. In coming to this decision for the High Court of Calcutta, Mallick, J. put forward several arguments (at p. 748) that "In exceptional circumstances ... where the shebait ... does not, or by his own act deprives himself of the power of representing the deity, a third party is competent to institute a suit in the name of the deity to protect the debutter property." The right of a member of his family or that of a worshipper to institute a suit to protect his right to worship and for that purpose debutter, was his personal right and that such suit was not the suit by the deity to protect its interests. His Lordship reasoned and came to the conclusion that "The deity has also a right of its own to have a suit instituted by a next friend" and such "a next friend is not limited to the members of the family or worshippers. Anybody can act as (such) a next friend, but ... anybody other than the shebait instituting a suit in the name of the deity must be appointed as such by an order of the Court."
 2. AIR 1970 SC 532.
 3. Ibid., p. 534, para. 8. For its judgement the Supreme Court relied on the decision in Pramatha Nath v. Pradhyumna Kumar AIR 1925 PC 139, see above, p. 295; Mahadeo Jew v. Balkrishna AIR 1952 Cal 763 and Asha Bibi v. Nabissa Sahib AIR 1957 Mad 583.
 4. AIR 1968 SC 915.
 5. Ibid., pp. 918-919. The court approved both Pramatha Nath v. Pradhyumna Kumar AIR 1925 PC 139 and Monohar Mookerjee v. Peary Mohan (1919-20) 24 CWN 478 = AIR 1920 Cal 210, on the point at issue.

The phrase "any person interested" must be interpreted to cover persons who have got either material or spiritual interests in the endowment. For a worshipper who does not have material interest in an endowment, was held in Biswanath v. Radha Ballabhji,¹ a very important case for the whole subject of suits relating to debutter, to be entitled to file suit for the protection of the debutter.

The law as it stands now is that any person materially or spiritually interested in a private religious endowment is entitled to bring suit for the protection of the endowment. It may be pointed out that the interest of the person in the endowment must be a continued not a contingent one.²

c. Mandamus

The word "mandamus" meaning "we command" in Latin³ is a high prerogative writ⁴ of a most extensive remedial nature⁵ issuing in England from the Queen's Bench Division⁶ and in India either from the Supreme Court according to Article 32 or from any High Court according to Article 226 of the Constitution of India.⁷ The origin of this writ was described by Bowen L.J.

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1. AIR 1967 SC 1044, 1047.
 2. Derrett, IMHL, 504. In Vikrama Das v. Daulat Ram AIR 1956 SC 382, 390, it was observed as "the ordinary rule that persons without title and who are intermeddlers cannot sue as of right is clear". See also Derrett, op.cit., 504, note 5 where he cited the case.
 3. Jowitt, op.cit., Vol. 2, 1977, 1139.
 4. Stroud's Judicial Dictionary, vol. 3, 4th ed., Sweet Y Maxwells, London 1973, 1615.
 5. Wharton's Law Lexicon, 14th ed., Law Publishers, London, 1958, 624.
 6. The order of mandamus issuing from the Queen's Bench Division was substituted for the writ of mandamus in England by the Administration of Justice (Miscellaneous Provision) Act 1938 - Jowitt, op.cit., vol. 2, 2nd ed., 1139. But the change was only in form, not in substance - H.M. Seervai, Constitutional Law of India, vol. 2, N.M.Tripathi, Bombay 1976, 752.
 7. Seervai, ibid., p. 751, where the learned author comments that "the part played by prerogative writs in England in securing the liberty of the subject and in protecting his rights and property was well known to the framers of our Constitution... Therefore, it is not surprising that the framers of the Constitution should have decided to arm the

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about one hundred years ago in In Re Nathan¹ where an application was made for a mandamus to the Commissioners of the Inland Revenue to pay back the amount of duty overpaid to the Commissioners. Bowen L.J. first questioned the origin of the writ by asking "What is the origin of the right that any man has to ask the Court for a writ of mandamus?" His Lordship then answered that

"A writ of mandamus, as everybody knows, is a high prerogative writ invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done."²

Now, Articles 32 and 226 of the Constitution of India refer only to the prerogative writ of mandamus and they do not mention common law or statutory forms of a writ of mandamus as available under English law.³

One great advantage of mandamus is that it can be used for the control of both judicial or quasi-judicial orders and administrative acts. It will issue to both a judicial or a quasi-judicial tribunal and an administrative authority vested with public duties.⁴

"Mandamus is a command issued by a Court asking a public authority to perform a public duty belonging to its office.⁵ For example, when it omits to decide a matter which it is bound to decide, it can be commanded to determine the questions which it has left undecided. Mandamus can be granted only when a legal duty is imposed on the authority in question and the petitioner has a legal right to compel the performance of the duty."⁶

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Supreme Court with the power to issue famous English writs by habeas corpus... mandamus for the enforcement of fundamental rights (Art. 32) and to arm all High Courts with power to issue the same writs for the enforcement of fundamental rights and for other purposes. (Art 226)."

1. (1883-84) 12 QBD 461.

2. (1883-84) 12 QBD 461, 478-479.

3. D.D. Basu, Commentary on the Constitution of India, Vol. 3, 5th ed., S.C. Sarkar & Sons, Calcutta, 1967, 474.

4. D.D. Basu, ibid., p. 475.

5. See on this point State of Mysore v. K.N. Chandrasekhara AIR 1975 SC 532, 537.

6. M.P. Jain, Indian Constitutional Law, 3rd ed., N.M. Tripathi, Bombay, 1978, 198-99.

Though both Articles 32 and 226 refer only to the prerogative writ of mandamus, the powers of both the Supreme Court and a High Court are not limited to the prerogative writs.¹ "The powers of the High Court under Article 226 are not strictly confined to the limits to which proceedings for prerogative writs are subject in English practice!"² The powers of the High Court under this Article are of "widest amplitude".³

In Lt.Col. Khajoor Singh v. Union of India,⁴ a case concerning the question of premature retirement of an army officer, Subba Rao, J. as he then was, in his dissenting judgement ruled that

"The power of the High Court under Article 226 of the Constitution is of the widest amplitude and it is not confined only to issuing writs in the nature of habeas corpus, etc. for it can also issue directions or orders against any person or authority, including in appropriate cases any Government...."⁵

Again, in Praga Tools Corpn. v. C.V. Immanuel⁶ a case where the workers applied for a writ of mandamus (instead of an injunction) restraining inter alia the company in question to implement an agreement, Shelat, J. pronounced that

"The condition for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is in form a command directed to a person, corporation, or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty."⁷

His Lordship added further that

"It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official

1. D.D. Basu, Shorter Constitution of India, Vol. 2, 7th ed., S.C.Sarker and Sons, Calcutta, 1978, 124, 125.

2. Per Beg, J. S.I. Syndicate v. Union of India, AIR 1975 SC 460, 468.

3. S. Malik, Supreme Court on Constitutional Law, Vol. 2, Eastern Book Co., Lucknow, 1974, 1237.

4. AIR 1961 SC 532.

5. AIR 1961 SC 532, 547.

6. AIR 1969 SC 1306.

7. Ibid., p. 1309.

or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed, and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings."¹

As a corollary of the observation of Shelat, J., it can be said that a mandamus can issue to a public official or a body to restrain them from implementing a statute alleged to infringe the religious rights of individuals.

In Ratilal v. State of Bombay² the petitioner, manager of a Jain temple, filed his petition to the High Court of Bombay against inter alia the state of Bombay and the Charity Commissioner "praying for the issue of a writ in the nature of mandamus or direction ordering and directing the respondents to forbear from enforcing or taking any steps for the enforcement of the Bombay Public Trusts Act, 1950 or any of its Provisions...."³ and the Supreme Court granted the prayer substantially when B.M. Mukherjea, J. as he then was, ruled for the Court that "The result...is that in our opinion the appeals are allowed only in part and a mandamus will issue...restraining the State Government and the Charity Commissioner from enforcing against the appellants the following provisions of the Act...."⁴ It may be pointed out that the Supreme Court ruled in favour of the appellant when it held that the provision in the Bombay Act regarding the appointment of the Charity Commissioner as a trustee "cannot be regarded as valid in regard to religious institutions of the type we have first indicated. To allow the Charity Commissioner to function as the shebait of a temple or the superior of a math would certainly amount to interference with the religious affairs of the institution."⁵

1. AIR 1969 SC 1306, 1309-10.

2. AIR 1954 SC 388. Supra p. 21.

3. Ibid., p. 390.

4. AIR 1954 SC 388, 396.

5. Ibid., p. 393.

Now a public officer can be served with a writ of mandamus if he interferes with the affairs of a religious trust or if he does not do his duty as imposed by a statute in relation to an administration of an endowment. But a shebait or a trustee of a religious endowment being not a public officer cannot be served with a writ of mandamus. However, a shebait of a public religious institution is in the same position as a public officer in the sense that he is engaged in the administration of an institution in which the affairs of the public are concerned. A public religious endowment is concerned with the affairs of the public and in managing that endowment he in a way serves the public as a public officer of a secular institution. So if a shebait fails to discharge his duties properly, or if he maladministers the endowment, a member of the public interested in the endowment must be empowered to ask the Court to serve the shebait with a writ of mandamus restraining him from maladministering the endowment. It is suggested that the scope of issuing the writ of mandamus should be enlarged to include in it persons like the shebait of a debutter or a mahant of a math.

Moreover, if a mandamus can issue to an official of a society to compel him to perform his duties under the provision of a statute by which a society is formed,¹ then it is quite logical to make the proposition that a shebait either of a public or a private religious endowment, being an official of the endowment, should be served with a writ of mandamus if he is unwilling to carry out the purposes of the endowment by which he is appointed as such and for the realisation of which the endowment itself is made. As the law rests, however, there are no means, as yet, whereby the court can be moved by petition to compel a delinquent shebait or shebait

1. Praga Tools Corpn. v. C.V. Immanuel, AIR 1969 SC 1306.

to perform their duty of protecting the debutter against encroachment of any kind. This is among the reasons which led to the enactment of state statutes controlling public religious endowments. No steps have been taken, however, to protect private endowments against inert or corrupt shebait.

SECTION 3.

DEITY'S RIGHT OF SUIT AS A JURISTIC PERSON

It has already been pointed out in the previous section that the ruling in Jagadindra Nath's case¹ is a general law regarding the right of a shebait to sue concerning a debutter if he chooses to do so, and the principle in the Privy Council case is applicable in normal circumstances where the shebait carries out his duties for the protection of the deity's interests.² But when a shebait or shebait is negligent in carrying on their duties or when they disagree or have by their conduct precluded themselves from instituting any suit, the deity as owner of the debutter is not entirely without a remedy,³ because it frequently happens that some one other than the shebait must institute a suit either in his own name⁴ or in the name of the deity, who has a theoretical independent

1. (1903-4) 31 IA 203.

2. B.K. Mukherjea op.cit., 4th ed. 258.

3. M.N. Srinivasan, Hindu Law, Vol. 3, 4th ed. Law Publishers, Allahabad, 1970, 2662.

4. "Where...shebait refuses to act for the idol, or where the suit is to challenge the act of the shebait himself or prejudicial to the interests of the idol, then there must be some other agency which must have the right to act for the idol. In such cases, the law accordingly recognises a right in persons interested in the endowment to take proceedings on behalf of the idol." B.K. Mukherjea, op.cit. 4th ed. 270, and this observation was quoted with approval in Biswanath v. Radha Ballabhji AIR 1967 SC 1044, 1047.

right of suit¹ to protect its own interests, to enforce (as it were) its rights.² A sceptic might say that the poor deity must offer up prayers that a human being will come to its rescue.

In Masjid Shahid Ganj Mosque v. Shiromani Gurdwara Parandhak Committee,³ a case relating to a mosque in Lahore, Sir George Rankin pronounced for the Judicial Committee that "The procedure of our Courts allows for a suit in the name of an idol or a deity, though the right of suit is really in the shebait..."⁴

It may be repeated that Jagadindra Nath's⁵ case must be taken as a law regarding the right of shebait to sue only when he acts for the protection of the debutter and this was the point which was aptly pointed out by Subba Rao, C.J. in Biswanath v. Radha Ballabhji⁶ dealing with the issue relating to the right of a worshipper to file suit for the protection of the debutter. The question whether under certain circumstances the rights of the idol⁷ can be vindicated through persons other than its shebait seems to have been settled by the Supreme Court in its celebrated decision in Biswanath's case.⁸ Referring to Pramatha Nath v. Pradyumna

1. Tarit Bhusan v. Sridhar Salagram AIR 1942, Cal 99, 104; Jangilal v. Panna Lal, AIR 1957 All 743, 745; Sri Iswar v. Gopinath Das AIR 1960 Cal 741, 748. The "true beneficiaries of religious endowments...are the worshippers..." See Deoki Nandan v. Murlidhar AIR 1957 SC 133, 137. See above 3rd chapter, Section 1.

2. Derrett, IMHL, 504.

3. (1939-40) 67 IA 251.

4. Ibid., p. 264.

5. (1903-4) 31 IA 203.

6. AIR 1967 SC 1044, 1046, para. 8.

7. Rights of an idol are not limited to those of idols representing a deity, but they include the rights of an idol of a living person like Sai Baba. In M.L. Hanumant Rao v. Sri Sai Baba (1980) 2 MLJ 507, an endowment was made in favour of an idol of Sai Baba which was installed in a temple. It was held that the suit concerned on behalf of the idol Sri Sai Baba was maintainable. See p. 517.

8. AIR 1967 SC 1044. Regarding the decision in the Supreme Court case, Dhavan observes that "In this remarkable judgment" Subba Rao, C.J. "held that since a private suit for recovery of property was not available as one of the remedies under section 92 of the Civil Procedure Code of 1908, a representative suit could be filed without invoking sec. 92 by a worshipper where the shebait was not acting in the idol's interests". Op.cit., 91.

Kumar¹ and Kanhaiya Lal v. Hamid Ali² the Supreme Court held that in these two cases

"the Board remanded the cases to the High Court in order that the High Court might appoint a disinterested person to represent the idol. No doubt in both the cases no question of any deity filing a suit for its protection arose, but the decisions are authorities for the position that apart from a shebait, under certain circumstances, the idol can be represented by disinterested persons".³

In Ramraghava Reddy v. Seshu Reddy⁴ where the suit was brought by the plaintiff for a declaration that the compromise decree to which the Commissioner, Hindu Religious Endowments Board, Madras, was a party and by which temple properties of the deity were declared to be secular properties of the defendant trustees, was not binding on the deity, Ramaswami, J. ruled for the Supreme Court that

"The possession and management of the property with the right to sue in respect thereof are, in the normal course, vested in the shebait, but where, however, the shebait is negligent or where the shebait himself is the guilty party against whom the deity needs relief it is open to the worshippers or other persons interested in the religious endowments to file suits for the protection of the trust property. It is open in such a case to the deity to file a suit⁵ through some person as next friend for recovery of possession of the property improperly alienated, or for other relief. Such a next friend may be a person who is a worshipper of the deity or is a prospective shebait or is legally interested in the endowment..."⁶

There is a divergence of judicial opinion whether a person other than a shebait can maintain a suit on behalf of the deity without prior permission of the Court. The majority of the decisions of the Calcutta

1. AIR 1925 PC 139.

2. AIR 1933 PC 198.

3. AIR 1967 SC 1044, 1047.

4. AIR 1967 SC 436.

5. "The deity as a juristic person has undoubtedly the right to institute a suit for the protection of its interest. So long as there is a Shebait in office, functioning properly, the rights of the deity ... practically lie dormant and it is the Shebait alone who files suits in the interest of the deity". B.K. Mukherjea, op.cit., 4th ed. 263-264.

6. AIR 1967 SC 436, 441.

High Court¹ support the view that any person who is not a shebait can file a suit on behalf of the deity only when he has obtained the permission of the Court. Both the Orissa² and the Patna³ High Courts have followed the same view as the Calcutta High Court. But this view is no longer correct, because the permission of a Court is not necessary in view of the decision in Biswanath v. Radha Ballabhji⁴ and this point will be dealt with again in Section 4 of this chapter. A comparative evaluation of the early discordant decisions would therefore be superogatory.

It seems to be a settled law that in case of a private debutter a member of the family or a member of the family of the donor or any person having independent interest in the endowment may bring a suit without prior permission of the Court.⁵ In this context the expression "interest" must be taken to imply both material and spiritual interest.⁶

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1. Administrator-General of Bengal v. Balkissen ILR (1954) 51 Cal 953, 959; Sharat Chandra Shee v. Dwarkanath Shee ILR (1931) 58 Cal 619, 622; Tarit Bhusan v. Sridhar Salagram AIR 1942 Cal 99, 112; Sree Sree Sreedhar Jew v. Kanta Mohan (1945-46) 50 CWN 14, 24; Sushama Roy v. Atul Krishna AIR 1955 Cal 624, 626; Sri Iswar v. Gopinath Das AIR 1960 Cal 741, 748, on which see below (p. 321). But the contrary view that no permission should be necessary for a person to institute a suit on behalf of the deity had been held by the Calcutta High Court in Thakur Sri Sri Annapurna v. Shiva Sundari Dasi ILR (1944) 2 Cal 144, 146 and Gopal Jew v. Baldeo (1946-47) 51 CWN 383, 404.
 2. Somanath Dani v. Shri Gopal Jew AIR 1961 Ori, 105, 107.
 3. Sri Ram v. Chandeswar Prasad AIR 1952 Pat 438, 443.
 4. See Biswanath's case AIR 1967 SC 1044, which is discussed in detail in the next section.
 5. Gopal Jew v. Baldeo (1946-47) 51 CWN 383, 404; Deoki Nandan v. Murli-dhar AIR 1957 SC 133 supra p. which was relied on in Behari Lal v. Radha Ballabhji AIR 1961 All 73, 78, by the Allahabad High Court to hold the view that a worshipper had a beneficial interest in the endowment. Jangi Lal v. Panna Lal AIR 1957 All 743, 745; Thakur Govind v. Susalli AIR 1967 All 278, 280. See also Derrett, IMHL, 504.
 6. Biswanath v. Radha Ballabhji, AIR 1967 SC 1044 has laid down the law to this effect. Thus, Subba Rao, C.J. observed for the Supreme Court that "Three legal concepts are well settled: (1) An idol of a Hindu temple is a juridical person; (2) when there is a shebait, ordinarily no person other than the shebait can represent the idol; and (3) worshippers

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Again, it may be clarified that a de facto shebait is also accepted by the Court as one of the persons competent to file suit on behalf of the deity for the protection of the debutter and to recover possession of the idol's property.¹ Moreover

"A de facto shebait is not disqualified from conducting suits to recover the idol's property merely because in substance he seeks to advance or protect his own interests - the blending of office and property in the character of the lawful shebait is present even in the case of a de facto shebait, and if the suit is framed in the deity's interests it will lie..."²

But the right of a de facto shebait to file a suit on the deity's behalf does not imply recognition of his right to continue in the management of the debutter.³

The proposition as laid down in two decisions⁴ of the Calcutta High Court that in the absence of a shebait any person, as next friend of the deity, may bring a suit on behalf of the idol does not seem to reflect the proper position of the law as laid down by other decisions of the same High Court and the opinions expressed on the point at issue by different textbook writers.⁵

(Continued from previous page)

of an idol are its beneficiaries, though only in a spiritual sense. It has also been held that persons who go in only for the purpose of devotion have according to Hindu law and religion, a greater and deeper respect in temple than mere servants who serve there for some pecuniary advantage: see Kalyana Venkataramana Ayyangar v. Kasturi Ranga Ayyangar, ILR 40 Mad 212 at p.225: (AIR 1917 Mad 112 at p.118)" - p. 1047.

1. Mahadeo Prasad v. Karia Bharti, AIR 1935 PC 44, 45-46; Jagannath v. Tir-thananda AIR 1952 Ori 312, 317-318, Sri Ram v. Chandeswar AIR 1952 Pat 438, 446; Sapta Koteswar v. R.V. Kittur AIR 1956 Bom 615, 616; Kanakulamala Nader v. Pichakanm Ariyar AIR 1954 Tra-co, 254, 256, Vikrama Das v. Daulat Ram AIR 1956 SC 382, 390.
2. Derrett, IMHL, 505.
3. Gopal v. Mahomed Jaffar AIR 1954 SC 5, 8.
4. Monmohan Halder v. Dibbendu Prosad AIR 1949 Cal 199, 203, Sri Iswar v. Gopinath Das AIR 1960 Cal 741, 748.
5. In both Sharat Chandra Shee v. Dwarkanath Shee ILR (1931) 58 Cal 619 and Tarit Bhusan v. Sridhar Salagram AIR 1942 Cal 99, the Calcutta High Court had laid down in effect the principle as involved in the following observation of B.K. Mukherjea, op.cit. 4th ed. 266, that "if a suit could be instituted on behalf of the idol by any person as its next friend, it

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In conclusion of this study it may be pointed out that an idol need not be a party in all suits relating to its property, because it is open to its manager to conduct suits in his own name¹ to recover its properties from the possession of trespassers. But when he denies the right of the idol to the debutter it is entitled to be represented by a disinterested next friend.² In this context it may be added that no settlement altering the terms of an instrument of dedication will be binding on the deity if the decision is taken in its absence and in such a situation the idol has a right to be heard in the matter.³ In a suit for the framing of a scheme a deity is not a necessary (additional) party

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would really be an invitation to all sorts of persons to come and meddle in the affairs of the idol and if the idol is bound by the result of such trust or proceeding, it would be disastrous to its interests".

Derrett also does not support the view in question when he observes that "The proposition which has been put forward that in the absence of a shebait any person may sue on the idol's behalf as next friend seems to go further than the law allows. Certainly a complete stranger who has merely a benevolent interest in the endowment, or has a grudge against the dishonest shebait, will not be entitled to sue, or to apply for permission (according to the practice of the relevant High Court)" - IMHL, 505.

1. Jagadindra Nath v. Hemanta Kumari (1903-4) 31 IA 203; Ramsarup Das v. Rameshwar Das AIR 1952 Pat 184, 187.
2. Pramatha Nath v. Pradhyumna Kumar AIR 1925 PC 139, Sri Ram v. Chandeshar Prosad AIR 1952 Pat 438, 443.
3. Mahadeo Jew v. Balkrishna AIR 1952 Cal 763, 765-766. Where the deity's interests are not affected by litigation and the party's claim does not go against the interest of the deity the Court does not feel it necessary for the deity to be represented in the suit (see Mukherjea, op.cit. 4th ed. 268). But if the deity's interests are likely to be affected by the result of a litigation and the shebait's or shebait's interest in the litigation is adverse to that of the deity and the deity is not represented in the suit, the Court may appoint a shebait ad litem or next friend to represent the deity or to express its will in the matter of the litigation. Thus in Pramatha Nath Mullick v. Pradhyumna Kumar Mullick (1924-25) 52 IA 245, see above, 3rd chapter, section 1, where the shebait's themselves engaged in litigation regarding one of the shebait's right of removal of the deity to his own residence and the deity itself was not represented in the litigation, the Privy Council held that the will of the deity relating to its location must be respected and the suit should be remitted to the High Court so that "the idol should appear by a disinterested next friend appointed by the Court" - p. 261.

unless its interests are affected by the framing of the scheme.¹

SECTION 4

RIGHTS OF WORSHIPPERS TO SUE IN DEITY'S NAME

a. Section 92 of the Code of Civil Procedure

Section 92² of the Code of Civil Procedure, 1908 (Act 5 of 1908) as amended by the Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976), provides that a suit against the shebait for the reliefs mentioned therein might be instituted only in the manner provided in the section. A private trust is not within the operation of this section³ and a suit under the section will be maintainable if it is related to a public trust⁴ which, it may be submitted, is not the main contention of this thesis. Under this section the Advocate-General or two or more worshippers having a substantial interest in the endowment may bring a suit⁵ for any of the reliefs, e.g. either for the removal of a trustee or for settling a scheme, provided by section 92 of the Civil Procedure Code⁶ after obtaining the leave of the Court. It may be pointed out that before the introduction of the Amendment Act (Act 104 of 1976) the persons suing under section 92 were to get the consent of the Advocate-

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1. Bimal Krishna v. Gunendra (Iswar Radha Ballav), AIR 1937 Cal 338, 341; Upendra Nath v. Nilmony AIR 1957 Cal 342, 344.
 2. See below, Appendix IIB.
 3. Gopal Lal v. Purna Chandra (1921-22) 49 IA 100, 107 supra p.171. It may be pointed out that Section 539 of the Civil Procedure Code as mentioned in the Privy Council case was replaced later on by Section 92 of the Civil Procedure Code, see B.K. Mukherjea op.cit. 4th ed. 467. See also on this point in Abdur Rahim v. Abu Md Barkat Ali AIR 1928 PC 16, 19.
 4. Mahant Pragdasji v. Ishwarlalbhai AIR 1952 SC 143, 144; Harendra Nath v. Kaliram Das AIR 1972 SC 246, 249; Vidya Sagar v. Ananda Swarup AIR 1981 All 106, 109.
 5. Derrett, IMHL 506-507.
 6. Varadachari, op.cit., 2nd ed. 300.

General and the consent was a condition precedent to any suit under section 92. His unwillingness to give consent led to many legal disputes involving inter alia the issue regarding the nature of his decision, which we shall discuss in detail later in this section.

Again, to attract Section 92 certain conditions¹ must be fulfilled. First of all, as mentioned above, the suit to lie under the section must be related to a public trust created for public religious or charitable purposes. Secondly, it must proceed on an allegation either of a breach of trust or on the ground of the necessity of taking directions from the Court for the administration of a trust.² Thirdly, the relief or reliefs claimed must be within the reliefs provided in the section. Finally, the suit must be brought in a representative capacity either in the interests of the trust or of the public and it must not be brought to vindicate the private rights of the plaintiff.³

In Pragdasji v. Ishwarlalbhai⁴ where the main issue was whether there existed a public trust of a religious and charitable character in respect of the suit properties, and the Court had jurisdiction to try the suit under section 92. B.K. Mukherjea, as he then was, observed for the Supreme Court that

"A suit under sec . 92 Civil Procedure Code is a suit of special nature which presupposes the existence of a public trust of a religious or charitable character. Such suit can proceed only on the allegation that there is a breach of such trust or that directions from the court are necessary for the administration thereof, and it must pray for one or other reliefs that are specifically mentioned in that sec. It is only when these conditions are fulfilled that the suit has got to be brought in conformity with the provisions of sec. 92, Civil Procedure Code."⁵

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1. B.K. Mukherjea, op.cit., 4th ed.
 2. Harendra Nath v. Kaliran Das AIR 1972 SC 246, 250; Vidya Sagar v. Ananda Swarup AIR 1981 All 106, 109.
 3. Budree Das v. Chooni Lal ILR (1906) 33 Cal 789, 807; Appana v. Narasinga ILR (1922) 45 Mad 113 (FB), 133-134; Paratmanand Saraswati v. R. Tripathi AIR 1975 SC 2140, 2144.
 4. AIR 1952 SC 143.
 5. Ibid., p. 144.

But section 92 has no application where the state statuses of different states, e.g. Madras, Bombay, Andhra Pradesh,¹ Orissa, have provided different machinery for the administration of public religious or charitable trusts.²

Let us now revert to the question of the nature of the decision the Advocate-General used to make in the event of being asked permission by persons interested in a public endowment to file suits under section 92 before the introduction of the Civil Procedure Code (Amendment) Act, 1976. Very little knowledge of India is required to verify that irrelevant political considerations may affect his decision. A judicial controversy which has lasted approximately twenty years centred on the issue whether the functions of an Advocate-General in relation to the section were judicial or quasi-judicial or purely administrative. And a corollary to the said issue was the issue whether in this regard his order to give or to decline consent for conducting a suit was amenable to be quashed by the issue of the writ of certiorari³ under Article 226 of the Constitution.

1. For example, section 110(e) of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966 (Andhra Act 17 of 1966) provides that Section 92 of the Civil Procedure Code is not applicable to charitable and religious institutions in that state. For the judicial decision on the point see P. Venkateswarlu v. P. Venkateswarlu AIR 1973 AP 264 (FB), 271, 273.

2. Derrett, IMHL, 507.

3. The word 'certiorari' means 'to be more fully informed of'. It is an original writ issued in England out of the Queen's Bench Division addressed to judges or officers of inferior Courts commanding them to return the record of proceedings in some cause depending before them with a view to seeing that justice might be done. Though the writ was abolished in England by the administrative of Justice (Miscellaneous Provisions) Act, 1938, the High Court has the power to make an order of certiorari in a case of lack of jurisdiction or error of law on the face of the record - Jowitt's Dictionary of English Law, Vol. I, 307.

In India the writ of certiorari is still in force but it generally means a writ to quash a decision on the ground of some defect in it - D.D. Basu, Commentary on the Constitution of India, vol. 3, 5th ed., S.C. Sarkar and Sons, Calcutta, 1967, 569.

Now in Abu Backer v. A-G of Tra-Co (1954),¹ the trust concerned was a public charitable trust founded by a certain Muslim of the then Cochin state. In that case the Advocate-General refused to grant permission to the petitioners to file suit under section 92 inter alia to remove the managing trustee. Aggrieved by the decision of the Advocate-General, alleging the decision as unjust, the petitioners instituted the present suit praying the High Court to use its jurisdiction under Articles 226 and 227² of the Constitution for calling up the record of proceedings before the Advocate and to quash his order by the issue of appropriate writs and directions. As the first defendant of the case, the Advocate-General contended inter alia that the correctness of his decision was not amenable to a writ of certiorari and in making his decision he was not acting either as a judicial or as a quasi-judicial tribunal.³ Though the division bench of the High Court of Travancore-Cochin refused to grant the prayer of the petitioners, it ruled against the contention of the Advocate-General that his order was not amenable to a writ of certiorari under Article 226. The High Court held that

"When the jurisdiction is...conferred on the High Court to issue writs in appropriate cases even as against a Government, there is no point in contending that such writs will not lie against the Advocate-General who is only an officer under the Government. His orders are undoubtedly liable to scrutiny by the High Court and are amenable to appropriate writs under Article 226, provided that there are justifiable grounds calling for such interference by the High Court".⁴

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1. AIR 1954 Tra-Co 331.
 2. Article 227 of the Constitution of India confers power on a High Court to control inferior Courts which is in addition to the power given to it by way of the different writs under Article 226. See D.D. Basu, Commentary on the Constitution of India, Vol. 4, 5th ed., S.C. Sarkar and Sons, Calcutta, 1968, 3.
 3. AIR 1954 Tra-Co 331, 335.
 4. Per Sankaran, J., ibid., p. 336.

Against the contention of the Advocate-General that he did not act as a judicial or quasi-judicial tribunal¹, the High Court held that though section 92 "does not specify the manner and the extent of the investigation" of any allegation of any party interested in an endowment

"it is obvious that the section contemplates the necessary investigation and inquiries being made by the Advocate-General before he finally decides whether the sanction or consent applied for should be given or not. It is equally obvious that he has to make a judicial approach to the question in controversy and then to arrive at a decision after due consideration of the facts and...there cannot be any doubt that the decision which the Advocate-General arrives at under section 92, Civil P.C. is a quasi-judicial decision".²

The view of the Travancore-Cochin High Court was followed by the Pepsu High Court in Sadhu Singh v. Mohatmin Dera³ in which aggrieved by the decision of the Advocate-General the petitioners urged the High Court inter alia to quash the order of the Advocate-General. The High Court did not entertain the petition; nevertheless it observed that "the view taken by the learned judges of the Travancore-Cochin High Court is the correct view and that the functions of the Advocate-General under section 92, C.P.C. are judicial in nature and not administrative or executive".⁴

But the majority of the decisions of High Courts held the opposite view regarding the nature of the functions of the Advocate-General; the decision of the Advocate-General in relation to section 92 was neither judicial nor quasi-judicial in nature.⁵ In A.K. Bhaskar v. Advocate-General⁶, the Advocate-General did not refuse to give consent to the

1. AIR 1954 Tra-Co. 331, 335.

2. Ibid., 338.

3. AIR 1956 Pepsu 65.

4. Per Singh, J., ibid., p. 68.

5. For example, Shrimali Lal v. Advocate General AIR 1955 Raj 166, 167; Shantanand v. Advocate-General AIR 1955 All 372, 376; A.K. Bhaskar v. Advocate-General AIR 1962 Ker. 90 (FB), 93; Abdul Kasim v. Mohd. Dawood AIR 1964 Mad 247, 250; Shavax v. Masood Hosain AIR 1965 AP 143, 152.

6. AIR 1962 Ker. 90 (FB).

petitioners for filing suit under section 92 but he granted only two reliefs out of the many reliefs asked by the petitioners. Aggrieved by the decision of the Advocate-General the plaintiffs submitted a writ under Art. 226 of the Constitution. Overruling the decision petition/of the Travancore-Cochin High Court in Abu Backer v. A-G of Tra-Co¹ the Full Bench of the Kerala High Court held that "notwithstanding that the Advocate-General has to form an opinion and come to a conclusion one way or the other when he acts under section 92, C.P.C., that does not make it either a judicial or a quasi-judicial order".² Again, the Full Bench made another ruling opposite to that of the Travancore-Cochin High Court. The Advocate-General

"does not decide anybody's rights and though it may be proper for him to issue notice to the proposed defendants and hear their viewpoint also, he is not bound to follow that procedure. Anything that he decides, does not become conclusive and it is open to the proposed defendants to fight a suit instituted even on such sanction on all grounds available to them in law. Therefore, we have to hold that the action of the Advocate-General cannot be judicially reviewed by this Court under Article 226 of the Constitution".³

The view of the Travancore-Cochin High Court as held in Abubacker v. A-G of Tra-Co⁴ and the contrary view represented by the decision of the Full Bench of the Kerala High Court consisting of three judges in A.K. Bhaskar v. Advocate-General⁵ were reconsidered in 1974 by a Full Bench of the same Court consisting of five judges in Simon v. Advocate-General.⁶ In that case, the petitioner applied to the Advocate-General for his permission to institute a suit under section 92 because of the trustee's mismanagement of an endowed property of a Jewish synagogue and misappropriating its funds, but the Advocate-General refused to give consent to

1. AIR 1954 Tra-Co. 331.

2. AIR 1962 Ker 90 (FB) 93.

3. Ibid., p. 93.

4. AIR 1954 Tra-Co. 331.

5. AIR 1962 Ker 90 (FB).

6. 1975 KLT 78 (FB).

the petitioner. The main question for determination of the Full Bench was whether the order of the Advocate-General refusing permission to the petitioner for filing a suit under section 92 of the Civil Procedure Code was amenable to be quashed by the issue of a writ of certiorari under Article 226.

In Simon's case,¹ the Full Bench rejected the argument of counsel for the petitioner based on Abu Backer's case² that the act of the Advocate-General in dealing with a petition under section 92 was either judicial or quasi-judicial, and to that effect Nair, C.J., held that "Very little judicial support... was for the view taken by the Travancore-Cochin High Court; only the Pepsu High Court in Sadhu Singh v. Mohatmin Dera, AIR 1956 Pepsu 65, followed the principle of that decision".³ But it must be pointed out that the Full Bench of the Kerala High Court did not overrule the whole of the decision of the Travancore-Cochin High Court; it refused to accept only one of the principles in that case. But the more important principle in Abu Backer's case⁴ that an act of the Advocate-General in relation to section 92 was amenable to judicial proceedings under Article 226 was accepted by the Kerala High Court in Simon's case.⁵ Nair, C.J. pronounced for the Kerala High Court that

"In a welfare State such as ours with a growing emphasis on administrative control which could interfere with the life, liberty and rights of citizens there should be the insistence that those who are invested with wide and varied powers act according to justice and fairness, and who can guarantee this but the Courts entrusted with the jurisdiction such as that in Article 226 of the Constitution? There can be no doubt that this jurisdiction will enable Courts to interfere in appropriate cases where administrative orders have affected the

1. 1975 KLT 78 (FB).

2. AIR 1954 Tra-Co. 331.

3. 1975 KLT 78 (FB), 81.

4. AIR 1954 Tra-Co. 331.

5. 1975 KLT 78 (FB), 81.

rights of parties or affected interests in a substantial manner as to cause real and serious injury, if there has been violation of the principles of natural justice, where it would apply, when there has been abuse of power, where the authority had acted in excess of the power conferred by a statute, or when there has been no dispassionate application of the mind, or there was nothing to indicate that the mind was applied."¹

In his judgement Mr. Chief Justice Nair referred to many English and Indian decisions including Padfield's case² where the Minister declined to refer the complaint of a committee of the Milk Marketing Board to the committee of investigation established under a particular enactment and Sahadora Devi v. Government of India³ where the Supreme Court dealt with the interpretation of powers of a military officer to grant a lease. By referring to English decisions and applying the principles involved in them his Lordship in effect applied in the facts of the case the rule of Justice, Equity and Good Conscience⁴ which may be invoked in a situation that is not within the scope of any law.

Moreover, the Full Bench rejected the principle in A.K. Bhaskar's case⁵ that in dealing with section 92 the Advocate-General decided nothing. Thus Nair, C.J. observed that the Advocate-General's

"conclusion to refuse consent can very adversely affect those who had applied for consent, (and can) certainly cause substantial injury... It is quite true ... that while granting consent no one is adversely affected, not even such prejudice as to sustain a petition under Art. 226 is caused. But can the same be said while refusing consent? The answer must be no in the light of what we have said".⁶

In Simon's case⁷, in his separate judgement Nambiyar, J. came to the

1. 1975 KLT 78 (FB), 85.

2. [1968] 1 All ER 694.

3. AIR 1971 SC 1599.

4. J.D.M. Derrett, "Justice, Equity and Good Conscience" (1962) 64 Bom LR Jnl. 127-152, passim.

5. AIR 1962 Ker 90 (FB).

6. 1975 KLT 78 (FB), 90.

7. Ibid.

same conclusion as the Chief Justice when his Lordship said that "I think that save in extreme cases, such, for instance, as where this Court is able to find that there has been no application of mind, no exercise of discretion at all by the Advocate-General, there would be no ground for interference under Art. 226."¹

The Kerala High Court in Simon v. Advocate-General² accepted in part both the views, opposite to each other, concerning the act of the Advocate-General in relation to his giving consent to the persons interested in an endowment for filing suits under section 92. The Court approved the ruling in A.K. Bhaskar v. Advocate-General³ that the act of the Advocate-General was neither judicial nor quasi-judicial but it accepted the main principle of the judgment in Abu Backer v. A-G of Tra-Co⁴ that the acts of the Advocate-General were amenable to Article 226 of the Constitution. It seems that the decision in Simon's case⁵ precipitated amendment of the Civil Procedure Code in 1976 to the effect that the persons suing under section 92 do not have to get the consent of the Advocate-General but instead they have to get the permission of the Court.⁶

b. Worshippers' Right to Sue to Protect Debutter

So far as worshippers of public religious trusts are concerned, they are entitled under Section 92 to bring suits on behalf of the deity. But no such statutory provision is available in the case of worshippers of private endowments, to bring suits for the protection of the debutter

1. 1975 KLT 78 (FB) 93.

2. Ibid.

3. AIR 1962 Ker 90 (FB).

4. AIR 1954 Tra-Co 331.

5. 1975 KLT 78 (FB).

6. In this context it may be said that B.K. Mukherjea's latest edition (1979) is not up to date with the present position of the law in question; it has only dealt with the old law relating to the Advocate-General's consent for suing under section 92 (see pp. 493-495).

properties - their rights are determined by the general law¹ on the subject.

Before we go into the details of the question at issue it must be pointed out that a worshipper as such does not have an unqualified right, as does a shebait, to conduct suits on behalf of a deity,² but his right to sue arises when a shebait declines to institute suits for the preservation of the deity's property.³

In Tarit Bhusan v. Sridhar Salagram⁴ where the suit was brought on the deity's behalf without the prior permission of the Court, by a mere worshipper, the daughter of the then shebait having no beneficial interest in the property of the deity in question, Pal, J. ruled inter alia that unless "the shebait was controlled or removed by the Court he alone could act for the idol"⁵ but "In exceptional circumstances, a deity can be represented in a legal proceeding by a person other than a shebait only by the special appointment of the Court."⁶ His Lordship ruled in effect that it was only the shebait who could effectively represent the idol and a mere worshipper was not entitled to represent the deity on his or her own, unless he or she obtained previously the permission of the Court to do so. The view of Pal, J. was accepted in Sri Iswar v. Gopinath Das⁷ and Sushama Roy v. Atul Krishna,⁸ where the question to be determined was whether or not a person interested in the worship of the deity could sue on the deity's behalf without having prior permission of the Court. But Sushama Roy⁹ went further when it laid down the law by declaring that "if anybody

1. B.K. Mukharjea, op.cit., 4th ed., 511.

2. Varadachari, op.cit., 2nd ed., 299.

3. Shashi Kumuri v. Dharendra Kishore ILR (1941) 1 Cal 309, 316-317.

4. AIR 1942 Cal 99.

5. Ibid., p. 115.

6. AIR 1942 Cal 99, 116.

7. AIR 1960 Cal 741, 748.

8. AIR 1955 Cal 624.

9. Ibid.

other than a shebait wishes to institute a suit on behalf of the deity, he should make an application to the Court, and the suit will be maintainable only if the Court appoints him as the shebait of the deity."¹ It is submitted that the tedious procedure involved in applying to the Court and the Court appointing a proper person to be the shebait, would consume so much time that a deity in imminent danger would have a poor chance of survival.²

In this context the decision of the Allahabad High Court in Behari Lal v. Radha Ballabhji³ seems to be more plausible and practical than that of the Calcutta High Court. It was an original decision⁴ in the sense that it recognised the right of a mere worshipper to sue on the deity's behalf for the protection of the debutter. In that case the worshipper filed the suit for the possession of the temple property which was sold by its shebait without any legal necessity. Gurtu, J. of the Allahabad High Court, holding the maintainability of the suit by the worshipper to recover the possession of the debutter, made a pioneer observation which we will see below, to help the Supreme Court make the most valuable judgement of the Court in a whole range of suits relating to debutter.⁵ His Lordship's pioneer remarks were:

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1. Per P.B. Mukharji, J. ; AIR 1955 Cal 624, 626.
 2. But the Calcutta High Court does not even now look to the interest of the deity as it cares about the technicalities of law. See Jogesh Chandra v. Iswar Braja Raj Jew Thakur, AIR 1981 Cal 259 which held at p.262 the same view as Susham Roy v. Atul Krishna, AIR 1955 Cal 624.
See the case as discussed below in this section.
 3. AIR 1961 All 73.
 4. The decision in Behari Lal v. Radha Ballabhji, *ibid.*, was relied on in Kishore v. Guman, AIR 1978 All 1, 4 where it was held that "it is ... well settled that in exceptional circumstances persons other than a shebait can institute a suit on behalf of an idol."
 5. Biswanath v. Radha Ballabhji AIR 1967 SC 1044, is an appeal case of Behari Lal v. Radha Ballabhji AIR 1961, All 73. Most of the principles laid down in the decision of the Allahabad case have been accepted by Subba Rao, C.J in his judgement of the Supreme Court.

"We are unable to understand why, if a declaration can be sought by a deity through a next friend who has a beneficial interest, a suit for possession cannot be filed in the same manner. The decree would be executed for the benefit of the idol and when the next friend took possession he would be taking it for the idol."¹

Mr. Justice Gurtu's argument is even more convincing when he observed that

"Once the right of a de facto manager is accepted,² then it seems to us that it is only one step further and involves no real breach of principle to allow one who has a beneficial interest in the temple property to take steps to see that the temple property is preserved to the idol and to file a suit for that purpose as the next friend of the deity bringing the suit in the name of the deity himself.

"Where even a de facto shebait is absent surely a person who has a beneficial interest should be permitted to come in. That the worshippers have a beneficial interest has been clearly laid down by their Lordships of the Supreme Court in Deoki Nandan v Murlidhar,... AIR 1957 SC 133. It has been laid down there that the true beneficiaries of a religious endowment are not the idols, but the worshippers, and that the purpose of the endowment is the maintenance of that worship for the benefit of the worshippers."³

It is submitted that no statement on the law in question, i.e. law regarding the right of a worshipper to sue on behalf of the deity for the recovery of the debutter property, has ever been so clearly expressed, avoiding technical jargon, as can be found for example, in the decisions made in Tarit Bhusan v. Sridhar Salagram⁴ and Sushama Roy v. Atul Krishna⁵ on one side, and Gopal Jew v. Baldeo⁶ on the other, over the application of Order 32 of the Civil Procedure Code concerning suits on behalf of infants. The view of the Allahabad High Court was upheld by the Supreme Court in Biswanath v.

1. AIR 1961 All 73, 78.

2. For the right of a de facto shebait see above, section 3 of this chapter.

3. AIR 1961 All 73, 78.

4. AIR 1942 Cal 99 where the daughter of the shebait, being a mere worshipper, was not allowed to protect the deity's interest - see p. 104. But in contrast see Radhamohan Dev v. Navakishore Naik AIR 1979 Ori 181, 186, para. 10, where the daughter of one of the founders was held to be entitled to file suit on behalf of the deity for possession of the deity's property.

5. AIR 1955 Cal 624.

6. (1946-47) 51 CWN 383.

Radha Ballabhji¹ which we will be discussing below in this section.

Now, though it was held in Ramraghava Reddy v. Seshu Reddy² (in which the Supreme Court's judgement was not cited) that "worshippers do not exercise the deity's power of suing to protect its own interests, they are not entitled to recover the possession of the property improperly alienated by the shebait, but they can be granted a declaratory decree that the alienation is not binding on the deity,"³ it seems that the observation of Ramaswami, J. is contradictory to his other observation in the same judgement that "where ... the shebait is negligent ... against whom the deity needs relief it is open to the worshippers or other persons interested in the religious endowment to file suits for the protection of the trust properties."⁴ Out of the two observations it appears from the first that a worshipper is entitled only to a declaratory decree relating to the deity's property, but it is difficult to make out the same meaning from the second, where the general entitlement of the worshipper to sue on the deity's behalf to protect its property appears to be conceded.⁵ In any case, it may be said that Mr. Justice Ramaswami is not clear on the point. Moreover, that case related to a public endowment.

However, the point at issue (the right of a mere worshipper to sue on behalf of the deity to recover possession of its property) was directly raised in the Supreme Court case of Biswanath v. Radha Ballabhji.⁶ The Court approved the famous observation of Seshagiri Aiyar, J. that "The worshippers have a deeper interest in the integrity and well-being of

1. AIR 1967 SC 1044, above, pp.

2. AIR 1967 SC 436.

3. Ibid., p. 440.

4. Ibid., p. 441.

5. If the shebait acts adversely to the deity's interest, then a worshipper has the right to institute suits both to protect its interest and to remove the offending shebait - see Balaji v. Narasingha Kar, AIR 1978 Ori 199, 102.

6. AIR 1967 SC 1044. Above pp. 307, 309-10.

the institutions"¹ than the shebait and the archaka, and applied the principle involved in it when Subba Rao, J. pronounced for the Court "that persons who go in only for the purpose of devotion have according to Hindu law and religion, a greater and deeper interest in temples than mere servants who serve there for some pecuniary advantage."² Moreover, the judgement of the Supreme Court as a whole has settled almost every issue relating to suits concerning debutter, and it is particularly important in solving the very controversial issue of the right of a mere worshipper to sue on the deity's behalf. Subba Rao, C.J. raised the question himself, by asking ?

"The question is, can a mere worshipper also being assistant to the shebait represent the idol when the shebait acts adversely to its interests and fails to take action to safeguard its interest? On principle we do not see any justification for denying such a right to the worshipper.³ An idol is in the position of a minor and when the person representing it leaves it in the lurch, a person interested in the worship of the idol can certainly be clothed with an ad hoc power of representation to protect its interest. It is a pragmatic, yet a legal solution to a difficult situation."⁴

This observation is a solution to a very controversial issue. Yet we find that even after fourteen years the Calcutta High Court failed to apply the principle to the facts of the case of Jogesh Chandra v. Sri Iswar Braja Raj Jew Thakur⁵ (a case where the wife of the offending shebait wanted to protect the interests of the deity by recovering possession of the alienated debutter properties through collusion and fraud) where it held

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1. Venkataramana v. Kasturi Ranga AIR 1917 Mad 112 (FB), 118.
 2. AIR 1967 SC 1044, 1047. The low status of pujaris, known to anthropologists, is outside our scope.
 3. See Derrett's ECMHL, Vol. 3, Leiden, A.J. Brill, 1977, 260-263, where he has made an excellent critique of the case and comments at p. 263 that the case of Biswanath v. Radha Ballabhji is "the leading case on this point."
 4. AIR 1967 SC 1044, 1047.
 5. AIR 1981 Cal 259.

following inter alia Tarit Buhsan's,¹ Sushama Roy's,² and Sri Iswar's³ cases, that a person other than the shebait or a prospective shebait could not sue on behalf of the deity without the permission of the Court. The Calcutta decision (it is submitted) is wrong, for it contravenes the law laid down in the Supreme Court decision that a person other than a shebait, having only spiritual interest, i.e. even a mere worshipper, could sue for the protection of the deity's interests, without the prior permission of the Court. In Biswanath's case⁴ the plaintiff, a mere worshipper, did not have the Court's permission before bringing the suit to recover possession of the debutter alienated wrongfully by the shebait. Tarit Bhusan⁵ and the like are no longer authority on the point at issue. For the Supreme Court's ruling in Biswanath's case⁶ must prevail.

Again, in the Supreme Court case Subba Rao, C.J. argued plausibly that if the worshipper could only sue either

"for removal of a shebait and for the appointment of another in order to enable him to take steps to recover the property, such a procedure will be rather prolonged and a complicated one and the interest of the idol may irreplaceably suffer,"⁷ but "this is what has been held often to be the law."⁸

In support of his ruling that a worshipper had a right to sue on the deity's behalf to protect its interests if a shebait acted adversely to an idol's interest the Supreme Court cited with approval many decisions⁹ of the

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| 1. AIR 1942 Cal 99. | 2. AIR 1955 Cal 624. |
| 3. AIR 1960 Cal 741. | 4. AIR 1967 SC 1044. |
| 5. AIR 1942 Cal 99. | 6. AIR 1967 SC 1044. |
| 7. <u>Ibid.</u> , p. 1047. | 8. Derrett, <u>ECMHL</u> , vol. 3, 262. |
| 9. <u>Radhabhai v. Chimnaji</u> ILR (1878) 3 Bom 27, a case where the wife as the plaintiff brought suit against her husband to recover debutter property; <u>Zafaryab Ali v. Baktewar Singh</u> ILR (1883) 5 All 497, a case where the worshippers brought the suit to set aside a mortgage of a mosque property; <u>Chidambaranatha v. Nallasiva</u> AIR 1918 Mad 464 which was related to a suit by the worshippers to set aside an alienation of a mutt property; <u>Dasandhoy v. Muhammad Abu Nasar</u> ILR (1911) 33 All 660 in which two muslims brought the suit to set aside an alienation of the wakf property; <u>Venkataramana v. Kasturi Ranga</u> AIR 1917 Mad 112 (FB) of which we have already made mention above; <u>Sri Radha Krishnaji v. Rameswar</u> AIR 1934 | |

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different High Courts.

The decision of the Supreme Court in Biswanath's case¹ alone can give the Courts guide lines regarding who, under what circumstances, can institute suits on the deity's behalf if a shebait acts adversely to the interests of the idol. It is an authority not only for the cases where mere worshippers, having only spiritual interest in the endowment, institute suits on behalf of the deity to recover possession of the debutter, but also for all those cases where persons having material interest in the endowment bring suits on the part of the deity. So the traditional proposition laid down by B.K. Mukherjea, J. in Panchkari v. Amode Lal,² a case relating to the recovery of certain endowed lands belonging to certain idols, that "none but a member of the family can have a legal right to worship the deity in the case of family endowment and no such person can sue on behalf of the deity for recovery of property belonging to it unless the founder has expressly given such power,"³ does not reflect the position of the present law on the subject. In Biswanath's case⁴ (a case of family endowment) the person who filed the suit, as a next friend of the deity, for the recovery of possession of the deity's property, was neither a member of the family of the endowment in question, nor a person authorised by the founder to institute suits on behalf of the deity to protect its interests.

But it must be stressed that our inference from the decision in the

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Pat 584 where the de facto shebait brought the suit for possession of the deity's property; Monmohan Halder v. Dibbendu Prosad AIR 1949 Cal 199, in which the worshippers of the deity called Badrika Nath Shiva Thakur brought the suit to protect its property from sale due to arrears in road cess.

1. AIR 1967 SC 1044

2. (1936-37) 41 CWN 1349 = AIR 1937 Cal 559.

3. AIR 1937 Cal 559, 561.

4. AIR 1967 SC 1044.

Supreme Court case that a worshipper having only a spiritual interest in an endowment without being a member of the family, is empowered to sue on the deity's behalf to protect the endowment, must not be given a broader interpretation to include any case of a casual worshipper whose spiritual interest in the endowment is "fugitive or intermittent".¹ In this context the spiritual interest of a worshipper must be a continued interest in the worship and the property of the deity. So the law as it stands today is that any member of the family, other than a shebait, whether he is a mere worshipper or not, or any worshipper who is a stranger to the family but admitted to the worship of the family deity and has a continued, not contingent, spiritual interest in the endowment, can institute suits on the deity's behalf for possession of its property from a person possessing illegally without prior permission of the Court. Technicalities of law concerning the permission of the Court must not be emphasised, because of the great principle involved in the Supreme Court judgment that

"Should it be held that a worshipper can file only a suit for the removal of a shebait and for the appointment of another in order to enable him to take steps to recover the property, such a procedure will be rather a prolonged and complicated one and the interest of the idol may irreparably suffer. That is why decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol."²

In so far as the private debutter is concerned, to sum up the rights of suit of the deity, the shebait and any other person in relation to debutter:

- a) In normal circumstances it is the shebait alone who can sue on behalf of the deity.
- b) A shebait or any other member of the family, whether a mere worshipper or not, or a person as both a mere worshipper and a stranger having

1. Derrett, IMHL, 504.

2. AIR 1967 SC 1044, 1047.

a continued interest in the endowment can sue to vindicate his personal right.

c) When a shebait acts adversely to the deity's interest, the right of the deity as owner of the debutter to sue in its name to protect its interests can be exercised through any member of the family or a stranger as a mere worshipper having a continued interest in the worship of the deity without any permission of the Court.

SECTION 5

SHEBAIT'S (a) ACCOUNTABILITY, (b) REMOVAL and (c) FRAMING A SCHEME FOR PRIVATE DEBUTTER.

As a private religious endowment lies outside the scope of section 92¹ of the Code of Civil Procedure or any other state statute controlling public religious trusts, as there is no statutory provision controlling the abuses of private endowments, let us find out what other remedies, apart from those in relation to suits for the protection of the debutter which we have already discussed above, are available to plaintiffs to prevent shebait's abuses of private endowments. Now, in the case of any abuse of a private endowment the remedy or remedies which are available to a plaintiff are provided by the general Law of the land.² Moreover, the civil Courts have power in providing remedies for abuses either in private or (unless barred by statute) in public religious trusts.

"Notwithstanding the number of statutes, central and provincial, dealing with regulation and control of public religious trusts, there is still room for the common jurisdiction of the civil courts in remedying abuses in the management of the debutter property."³

1. Varadachari, op.cit., 291.

2. B.K. Mukherjea, op.cit., 4th edition, 511, where the learned author observes that: "The suits relating to such private trusts are not regulated by any statute as in the case of public trusts, they are governed by the general law of the land."

3. Derrett, IMHL, 506.

(a) Shebait's Accountability

A shebait or a "manager" is in the position of a trustee".¹ In other words, he is accountable as a trustee for the management of the trust or endowed property. It may be interjected here that it seems that it is only in this aspect that there is similarity between a shebait of a family endowment and a trustee in the English sense. It seems that a shebait can in no other way be compared with a trustee; moreover the former is also a beneficial owner of the trust or the endowed property² and it is this characteristic of shebait which greatly differentiates it from trusteeship at large.

Now, a shebait as a trustee of the debutter must protect the interest of the deity and must not deal with the debutter in such a way as to make his own material or financial gain. In Monohar v. Peary Mohan³ where the suit was related to a portion of a debutter property purchased by the son of the trustee in an execution sale, Sir Asutosh Mookerjee and Panton, J.J. laid down an important principle in their observation that:

"The law does not stop to inquire into the fairness of the sale or the adequacy of the price, but stamps its disapproval upon a transaction which creates a conflict between the self interest and integrity of the trustee."⁴

This point of honesty or integrity of a shebait in relation to the

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1. Ramanathan Chetti v. Murugappa Chetti (1905-6) 33 IA 139, 144 where the suit was brought to recover possession inter alia for books of account.
 2. Angurbala v. Debabrata AIR 1951 SC 293, 296 para ii, where it was held that a shebait "has a beneficial interest in the debutter property". See above pp.218-219.
 3. AIR 1920 Cal 210. The judgement of the Calcutta High Court was affirmed by the Privy Council in Peary Mohan Mukherji v. Monohar Mukherjee (1920-21) 48 IA 158.
 4. AIR 1920 Cal 210, 217.

debutter was also stressed in the oft-quoted¹ observation of Lord Blanesburgh in Gulzari Lal v. Collector of Etah² where a dishonest shebait alienated, without any legal necessity, the whole of the endowed property comprising eleven villages. His Lordship pronounced for the Privy Council that:

"The standard of rectitude and accuracy expected from every trustee of charitable funds is of the highest, and that standard must in all circumstances be maintained by the Courts if the safety of property held upon such trusts is not to be imperilled..."³

A shebait being in the position of a trustee and as a manager of the deity, is bound to maintain regular accounts of the income and expenses of the debutter.⁴ The obligation to maintain accounts lies in the shebait because of the fact that no other person other than a shebait is responsible for the application of the debutter funds.⁵ He can be made personally liable for any defalcation of the debutter funds.⁶

In Bhagwan Dass v. Jairam Dass,⁷ a case relating to an institution called the Dera, of a public religious and charitable nature, Dua and Mahajan, J.J. gave judgement for the Punjab High Court and in their Lordships' judgement almost all the principles of the subject in question have been laid down. Thus their Lordships observed:

"It is indispensable ... that a mahant or a shebait who has accepted this office or acknowledged himself as such, is incapable of asserting any hostile title against the trust, such disability being implicit in any person who holds fiduciary

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1. See Derrett, IMHL, 505-506; Varadachari op.cit. 200; B.K. Mukherjea, op.cit. 4th edition, 319 where the observation has been quoted.
 2. AIR 1931 PC 120.
 3. Ibid., p. 123.
 4. B.K. Mukherjea, op.cit., 4th edition, 316.
 5. Varadachari, op.cit., 199.
 6. Nirmal Chandra v. Jyoti Prosad AIR 1941 Cal 562, 568. For the facts of the case see below, this section.
 7. AIR 1965 Punj 260.

position in relation to another. It is also his duty to keep regular accounts of the trust property, for he is responsible for the due application of the trust money and, is bound to keep regular accounts of income and expenses."

But there is no hard and fast rule regarding the way a shebait should keep accounts; it largely depends on the custom² of a particular institution but the obligation to maintain it is implicit in the very office of a shebait.³ In the case of a family endowment the heirs of the founder are entitled to conduct a suit for accounts when any allegation of mismanagement is made against the manager.⁴ "Clear and distinct accounts of the property ought to be kept by all trustees, so that they are ready at any time, with accurate information as to the disposition of the trust funds".⁵ This is evidently in their own interests and forms a legal protection for them in case of their being called to account for their administration of the endowment. Should no one be concerned enough to call them to account, it is nevertheless their duty as shebait to keep regular accounts of the debutter property.⁶

Now the founder or his heirs having sufficient interest in a private endowment are the persons to be entitled to maintain "suits against the shebait for an account of his management of the debutter property, as well as against alienees from the shebait to recover property improperly alienated."⁷ In Monchar v. Peary Mohan⁸ this point was also stressed when

1. AIR 1965 Punj 260, 262.

2. B.K. Mukherjea, op.cit. 4th ed., 316.

3. Bhagwan Dass v. Jairam Dass AIR 1965 Punj 260, 262-263.

4. Bhimasena v. Ramesh Chandra AIR 1978 Ori 159, 161.

5. Per Scott J. in Thackersey v. Hurbhum ILR (1884) 8 Bom 432, 470 where the suit was brought inter alia for making the trustees liable for the money lost to the temple and the caste in question.

6. Bhagwan Dass v. Jairam Dass AIR 1965 Punj 260, 262.

7. Derrett, IMHL, 506.

8. AIR 1920 Cal 210.

it was observed that "the founder or his heirs may invoke the assistance of a judicial tribunal for the proper administration" of a debutter "on the allegation that the trusts are not properly maintained...." But it can be argued that it is not the founder or his heirs only who are able to maintain suits in the case of a shebait's improper administration of a debutter, but persons who are spiritually interested in the endowment are also qualified to sue a shebait for his improper administration of the endowed property. If the right to sue on behalf of the deity against a dishonest shebait is not limited to the members of the family¹ interested in an endowment then it is logical that the persons entitled to sue a shebait for his maladministration and invoke the help of a Court for the proper administration of the debutter should not be limited to the founder and his heirs. A shebait should be accountable for his management of a private debutter to all persons interested in the endowment; and this is exactly the principle which can be sifted out of the observation of Sarkar, J. in Upendra Nath v. Nilmony² where the co-shebait and the managing shebait were brothers and the co-shebait as the plaintiff filed the suit against the managing shebait alleging inter alia the misappropriation of the debutter income and asked the Court for a decree for accounts. Sarkar, J. pronounced for the Calcutta High Court that

"A shebait who has received the income of the debutter properties and misappropriated or misapplied the same without spending it for the purposes of the deity and has not kept proper account of the income and the expenditure, cannot refuse to render accounts when so required by the other shebait or persons interested in the endowment. It is well settled that if a shebait is negligent or is the guilty party against whom the deity needs relief, it is open to a worshipper or any person interested in the endowment to bring a suit for the protection of the endowment ... So under such circumstances there can be no objection to a co-shebait suing for the rendition of accounts against the managing shebait."³

1. Biswanath v. Radha Ballabji AIR 1967 SC 1044.

2. AIR 1957 Cal 342.

3. AIR 1957 Cal 342, 344.

If a suit is brought against a shebait for accounts, the Court may compel the shebait to be "personally accountable for defalcations and deficiencies which are not adequately explained."¹ Again, under its inherent jurisdiction² a civil Court may ignore an exemption clause in an instrument of dedication exempting a shebait from the liability of rendering accounts as repugnant and instead order rendition of accounts.³ It is interesting to point out that a shebait is also entitled to receive accounts from any of his co-shebait when his own right is endangered by a breach of trust.⁴

(b) Removal of a Shebait

The "standard of rectitude and accuracy expected from" a shebait or a trustee of a private debutter or of any religious or charitable endowment is "of the highest"⁵ and the Court is to see that the standard expected from a trustee of an endowment is properly maintained. So a shebait who is guilty of misconduct or abuses his position as a trustee of the debutter, can be removed in a judicial proceeding.⁶

What constitutes a sufficient reason for the removal of a shebait is determined by the Court.⁷ In Monohar v. Peary Mohan⁸ Sir Asutosh Mookerjee and Panton, J.J. observed that "no useful purpose would be served by an examination of decided cases to determine what constitutes a sufficient reason for removing a trustee. The matter is within what is called the sound judicial discretion of the Court. The Court is guided by the con-

1. Derrett, IMHL, 506. See also Nirmal Chandra v. Jyoti Prosad AIR 1941 Cal 562, 568; Ramchand v. Janki Ballabhji AIR 1970 SC 532, 534, see below, this section; N.R. Raghavachariar, Hindu Law, vol. 1, 7th ed., MLJ, 1980, 658; M.N. Das, Laws Relating to Partition, 2nd ed., Eastern Law House, Calcutta, 1981, 584.

2. Derrett, IMHL, 506.

3. Upendra Nath v. Nilmony AIR 1957 Cal 342, 344.

4. Ibid., p. 344; Derrett, IMHL, 506.

5. Gulzari Lal v. Collector of Etah (1930-31) 58 IA 460, 465.

6. B.K. Mukherjea, op.cit., 4th ed., 319. 7. Mukherjea, ibid., p. 319.

8. AIR 1920 Cal 210.

siderations of the welfare of the beneficiaries and of the trust estate; and there must be a clear necessity for interference to save the trust property."¹

Now, a shebait's assertion of his right to treat the debutter as his own and to utilise the income or the funds of the debutter for his personal purposes will be deemed by the Court as sufficient grounds for his removal from office.² In Bhagwan Das v. Jairam Das³ it was observed that "failure to keep proper accounts of the dera and assertion of hostile title of his own by the mahant to the trust property are sufficient grounds for his removal."⁴

In Thenappa Chettiar v. Karuppan Chettiar⁵ where the suit was brought inter alia for an account of the management of a debutter the Supreme Court in unambiguous terms laid down that

"If there is a breach of trust or mismanagement on the part of the trustee, a suit can be brought in a civil court by any person interested for the removal of the trustee and the proper administration of the endowment."⁶

In Ramchand v. Janki Ballabhji⁷ a case where a donor of a temple brought the suit against the dishonest pujari-cum-shebait who claimed title to the debutter property, the Supreme Court ruled that the shebait was not fit to remain in possession and management of the debutter.⁸

Again, it will be considered a sufficient reason for a Court to order the removal of a shebait either for grossly improper conduct amounting to an abuse of his fiduciary position⁹ or for "placing himself in a position inconsistent with the faithful discharge of his duties; but not for

1. AIR 1920 Cal 210, 222.

2. The "assertion of a right to treat the endowed property as his own or a claim to apply trust funds for his private purposes are adequate grounds for the removal of a shebait." - Varadachari, op.cit., 200.

3. AIR 1960 Punj. 260

4. Ibid., p. 263

5. AIR 1968 SC 915

6. AIR 1968 SC 915, 918-919

7. AIR 1970 SC 532.

8. Ibid., p. 534.

9. Nirmal Chandra v. Jyoti Prosad AIR 1941 Cal 562, 568.

laziness or incompetence".¹ In Nirmal Chandra v. Jyoti Prasad² where the co-shebait brought the suit for the removal of other shebait on grounds of misappropriation and neglect of duties and where one of the shebait allowed a suit to be dismissed for non-prosecution, B.K. Mukherjea, J. as he then was, referring to the conduct of the one of the shebait observed for the Calcutta High Court that "This was conduct which fell below the standard of rectitude and accuracy expected from a trustee of charitable funds and justified the removal of defendant 1 from his position of trust".³

In Satish Chandra v. Dharanidhar Sinha⁴ the case was instituted inter alia for an order for the removal of a shebait of a shrine of Sri Taraknath in Bengal. In spite of the presence of both secular and religious elements and of the blending of office and property and mixing of duties and personal rights in the conception of mahantship, the Privy Council held that if it was found that the performance of obligations of a mahant's office could not be done without danger to the endowment that was a sufficient ground for his removal.⁵ But the more important principle was laid down by the Privy Council when referring to the question of removal of religious heads of various Hindu religious foundations Mr. M.R. Jayakar observed that

"The Court may sometimes not order their total removal, but may associate with them a committee of management. But these are matters for the consideration of the Civil Court, which must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will suit the requirements of the case. But the jurisdiction of the Civil Courts to decide such questions can no longer be doubted."⁶

It is obvious that subsequent to an order of the removal of a shebait a new shebait will be authorised to take charge of the debutter but even

1. Derrett, IMHL, 507

2. AIR 1941 Cal 562.

3. Ibid., p. 568.

4. (1939-40) 67 IA 32.

5. Satish Chandra's Case (1939-40) 67 IA 32, 46.

6. (1939-40) 67 IA 32, 46.

during pendency of a suit instituted for the purpose of removing a shebait, the Court has jurisdiction to appoint a receiver to manage the debutter.¹

A shebait can be removed by suit by the founder or his heirs or any person interested² in the endowment for his mismanaging or misappropriating the deity's property. In Monohar v. Peary Mohan³ it was observed that "the founder or his heirs may sue for the enforcement of the trust, for the removal of the trustee, for the appointment of a new one and may thereby secure the proper administration of the trust and its property."⁴ But it must be stressed again that this right of action against a dishonest shebait is not limited to the founder and the members of his family; following Biswanath's case⁵ it can be said that the right is open to anybody who is spiritually and materially interested in the endowment.

The question relating to removal of a shebait and the power of a Civil Court to deal with the matter has never been a controversial one, but if the remedy for a plaintiff in a suit of private endowment had been a statutory one, like that of a plaintiff in a suit of a public endowment under Section 92, judges would not have to waste time in delivering their judgement on the point at issue if it was raised in a case. The rule relating to removal of a shebait is settled and it can pose no problem as to inclusion in a future code of the rules on debutter.

c) Framing a Scheme for Private Debutter

In spite of the existing statutes dealing with regulations and control of Hindu public religious endowments and the absence of any central or

1. Saligram v. Raghavacharia AIR 1969 Pat 118, 124, Varadachari, *op.cit.* 200, T. Mahmood, Studies in Hindu Law, Law Book Co. Allahabad, 1981, 738.

2. Thenappa Chettiar v. Karuppan Chettiar AIR 1968 SC 915, 919.

3. AIR 1920 Cal 210.

4. Ibid., p. 215.

5. AIR 1967 SC 1044.

state statute regulating and controlling Hindu private religious endowments "there is still room for the common jurisdiction of the civil courts in remedying abuses in the management of debutter property."¹ The principle involved in the said observation is equally applicable in the case of entertaining a suit by a civil Court for framing a scheme of management for a private debutter. In other words, the civil Courts have jurisdiction to settle a scheme in the case of a private religious endowment and this view has been settled by the uniform ruling in a large number of decisions² of the Privy Council, the Supreme Court and different High Courts.

In Bimal Krishna v. Gunendra Krishna,³ rejecting the contention of the defendants that the Civil Court had no jurisdiction to settle a scheme of a private debutter, B.K. Mukherjea, J. as he then was, held for the

1. Derrett, IMHL, 506.

2. Pramatha v. Pradhyumna AIR 1925 PC 139 where the Privy Council directed for framing a scheme. Rabindra Nath v. Chandi Charan AIR 1932 Cal 117, a case where the heirs of the founder brought the suit for framing a scheme. Prasad Das v. Jagannath Das AIR 1933 Cal 519, 522 in which the Calcutta High Court directed the Master of the Court for framing the scheme. Bimal Krishna v. Gunendra AIR 1937 Cal 338, 341, a very important case for the purpose of this section which will be discussed in this section. Mahadeo Jew v. Balkrishna AIR 1952 Cal 763, 768 where the suit was brought inter alia for a scheme of a private debutter. Narayanswami v. Balasundaram AIR 1953 Mad 750, 754 a case in which the property was dedicated for the purpose of conducting mandagapadis at Madurai. Chellam Pillai v. Chatham Pillai AIR 1953 Tra-Co 198, 202 where the suit was brought inter alia for framing a scheme. Upendra Nath v. Nilmony AIR 1957 Cal 342, 346 where the Calcutta High Court approved the ruling of the lower Court that in the circumstances of the case framing a scheme was necessary. Ramaswami v. Aiyasami AIR 1960 Mad 467, 475 where though the suit was concerned with a public trust, the Madras High Court held that a civil Court could frame a scheme for a private debutter. Thenappa Chettiar v. Karuppan Chettiar AIR 1968 SC 915, 917, the case will be discussed in the section. Ramchand v. Janki Ballabhji AIR 1970 SC 532, 534 this case will also be dealt with below in the section. Brindaban v. Ram Laxhan AIR 1975 All 255, 258 which relied on the said two Supreme Court cases for its ruling on the point at issue. Radhamohan Dev v. Nabakishore Naik AIR 1979 Ori 181, 185-186 but the Orissa High Court omitted to refer to Ramchand v. Janki Ballabhji AIR 1970 SC 532.

3. (1936-37) 41 CWN 728 = AIR 1937 Cal 338.

Calcutta High Court that

"In India, the Crown is the constitutional protector of all infants and, as the deity occupies in law the position of an infant, the shebait who represents the deity are entitled to seek the assistance of the Court in case of mismanagement or maladministration of the deity's estate and to have a proper scheme for management framed which would end the disputes amongst the guardians and prevent the debutter estate from being wasted and ruined."¹

His Lordship referred inter alia to Pramatha Nath v. Pradyumna Kumar²

in which the Judicial Committee directed the framing of a scheme and remanded the case to the trial Court specifically to that end laying down an important ruling that a civil Court was competent "to entertain a suit the object of which is to have a scheme established for the administration of a private debutter."³

Now the founder or his heirs retain sufficient interest to file a suit for framing a scheme⁴ and it is open to the Court to frame such a scheme.⁵ The civil Court has inherent power to deal with the matter concerned and this point of inherent jurisdiction of the civil Court to entertain a suit for a scheme of private debutter is implied in the famous statement of Sir Asutosh Mookerjee and Panton, J.J. which may be repeated that

1. AIR 1937 Cal 338, 341. In coming to this decision the Court relied on the judgement in Monohar v. Peary Mohan, AIR 1920 Cal 21, where Sir Asutosh Mookerjee, J. "invoked the analogy of the rule of English law according to which in the case of a charitable corporation where the founder was a private person he and his heirs became visitors in law and in case such heirs were extinct or were incompetent the visitatorial powers devolved on the Crown. It is true that in England such trusts are regarded as matters of public concern and the Attorney-General who represents the Crown takes proceedings on his behalf for protection of these charities...." See AIR 1937 Cal 338, 341. So the deity being incompetent and being represented by its shebait can get assistance from the Court in case of any mismanagement of its property.

2. AIR 1925 PC 139.

3. AIR 1937 Cal 338, 341. But it was argued against schemes in private debutter by the counsel for the appellants, the original defendants, that the debutter in question being a private one, section 92 of the Code of Civil Procedure had no application. The shebait of a private religious endowment could have their rights adjudicated if a dispute arose regarding the same. The civil Court, however, could not frame any scheme as it could do in the case of a public debutter - see p. 340.

4. Varadachari, op.cit. 294.

5. B.K.Mukherjea, op.cit. 4th ed., 516.

"in respect of a debutter in this country, the founder or his heirs may invoke the assistance of a judicial tribunal for proper administration thereof on the allegation that the trusts are not properly performed..."¹

The aforesaid observation of their Lordships is practically the judgment of the Privy Council in Peary Mohan v. Monohar² because the decision of the High Court was affirmed by the Judicial Committee.

The Supreme Court in two decisions spelt out unambiguously that even in case of a private religious endowment the civil Courts had jurisdiction to entertain a suit for framing or settling a scheme for the management of the debutter.³ It may be stressed again that it is under its inherent jurisdiction⁴ that a civil Court can entertain a suit for a scheme of a private debutter.

Now the Supreme Court case of Thenappa Chettiar v. Karuppan Chettiar⁵ is directly related to the subject at issue. In that case the suit was brought "for the settlement of a scheme in respect of a trust"⁶ founded for the worship of the deity called God Vinayagar. Though the Supreme Court did not accept the contention of the plaintiffs that a scheme was necessary for the proper administration of the debutter it reiterated the already settled rule in unambiguous terms that "even in the case of a private trust a suit can be filed for the removal of a trustee or for settlement of a scheme for the purpose of effectively carrying out the objects of the trust."⁷ The Supreme Court referred to Pramatha Nath v. Pradhyumna Kumar,⁸ Monohar v. Peary Mohan⁹ and Bimal Krishna v. Gunendra¹⁰

1. Manohar v. Peary Mohan AIR 1920 Cal 210, 215. See above, p.337.

2. (1920-21) 48 IA 258

3. Thenappa Chettiar v. Karuppan Chettiar AIR 1968 SC 915 and Ramchand v. Janki Ballabhji AIR 1970 SC 532.

4. Derrett, IMHL, 506.

5. AIR 1968 SC 915.

6. Ibid., p. 916.

7. Ibid., p. 918.

8. AIR 1925 PC 139.

9. AIR 1920 Cal 210.

10. AIR 1937 Cal 338. For the summary of arguments put forward in the case against schemes in private debutter see above, this section.

in support of its ruling.

In Ramchand v. Janki Ballabhji¹ where the dishonest pujari-cum-shebait misappropriated the deity's property and set up his personal title to it, the Supreme Court did not deviate from its previous ruling on the subject in question. Shah, Ag. C.J. pronounced for the Supreme Court by referring to the endowment in question that "This is undoubtedly a private trust but the civil courts have jurisdiction to frame a scheme for the management of the temple which is not a public trust."² The ruling of the Court is a well settled law but in laying down the principle the citation of cases was defective, because he omitted to cite cases like Bimal Krishna v. Gunendra,³ Monohar v. Peary Mohan⁴ and even the previous Supreme Court case (i.e. Thenappa Chettiar's case, AIR 1968 SC 915) on the subject and these three cases, especially the first two, have contributed much in evolving the principle that civil Courts have jurisdiction to entertain suits for framing a scheme for the management of a debutter.

In Mahadeo Jew v. Balkrishna,⁵ where inter alia the relief prayed for was a decree for the administration of a trust property and for a scheme for managing thereof, Mukharji, J. as he then was, made an interesting ruling that the right to institute suit for a scheme and the administration of a private debutter was a civil right⁶ falling within the scope of Section 9 of the Civil Procedure Code.⁷ Thus His Lordship remarked that

"I am...of the opinion that a suit for a scheme and administration of a private trust is a justiciable claim within the meaning of sec. 9, Civil P.C. and therefore the Court has all the relevant and necessary powers to determine a scheme for the proper administration and due management of the trust."⁸

1. AIR 1970 SC 532.

2. Ibid., p. 534.

3. AIR 1937 Cal. 338

4. AIR 1920 CAL 210.

5. AIR 1952 Cal 763.

6. See Varadachari, op.cit., 294 where the learned author pointed out the ruling of the Calcutta High Court.

7. See below, Appendix IIB, for the text.

8. AIR 1952 Cal 763, 768.

In my opinion the ruling of Murkharji, J. was not only sound but also novel. No suit relating to the management or the administration of a debutter can have as its principal point for determination a caste or religious question which could make it barred under section 9. The kind of suit with which we are dealing is of a civil nature and can be tried by the civil Courts under section 9.

In conclusion of this study it may be said that in any future codification of rules relating to private debutter, the legislators will be in no difficulty regarding the framing of a scheme, because of the uniform ruling of the Courts on the subject at issue.

SECTION 6

DUTY OF THE STATE

The observation of Sir Asutosh Mookerjee in Bhupati Nath v. Ram Lal¹ that "the king, as the ultimate protector of the State, undertakes the supervision of all endowments"² could be more applicable to ancient than modern India. The ancient Indian religious endowments were under the guarantee of the protection of the king; embezzlers of endowed properties were subject to severe punishment, e.g. exile. This point has been made clear in Visnusmriti.³ It has also been pointed out in Sukraniti that the king's prime duty is to protect religious endowments.⁴ Thus in

1. ILR (1910) 37 Cal 128 (FB).

2. Ibid., p. 155. See the similarity of this observation with that of B.K. Mukherjea, J. as he then was, in respect of the content in Bimal Krishna v. Gunendra Krishna, AIR 1937 Cal 338, 341 that "In India, the Crown is the constitutional protector of all infants..." etc. which has been quoted in detail in the previous section.

3. See Pandit v. Krishnamacharya (ed.), Visnusmriti With The Commentary Kesavaijayanti of Nandapandita, Vol. I, The Adyar Library and Research Centre, Madras, 1964, p. 137 (on Visṇu V. 168). Visṇu V. 168 says: ganadravyapaharta vivasyah which means that any person embezzling "goods belonging to a corporation (of Brahmins and which have been sent to them by the King or private persons), shall be banished" - see F. Max Müller (ed.) The Sacred Books of the East, vol. 7, Macmillan & Co., publishers to the University of Oxford, 1880, p.38. The goods or properties as referred to above are in effect endowed properties.

4. See Sukraniti, Chapter IV, p.9 as cited by Mukherjea, op.cit. 4th ed. 455.

Rajah Muttu Ramalinga Setupati v. Periyamayagum¹ the celebrated case relating to a rich endowment, a pagoda, of Rameswaram, the Judicial Committee held that "The British Government by virtue of its sovereign power, asserted, as the former Rulers of the country had done, the right to visit endowments of this kind and to prevent ^{or} redress abuses in their management."² In Manohar Ganesh Tambekar v. Lakhmiram Govindram³ a document dated 1793 (exhibit 210 of the case) showed the visitorial power of the native governor to prevent waste of the debutter by the shebait or other temple servants.⁴ The modern State of India has introduced various state legislations to control public religious endowments and a powerful Commission, The Hindu Religious Endowments Commission, was set up in 1960 "for the purpose of making an inquiry into certain matters connected with Hindu public religious endowments."⁵ So the Report of the Hindu Religious Endowments Commission which came out in 1962 was about the conditions in, and made suggestions relating to, public religious trusts; private Hindu religious endowments "were immune from their scope of reference and equally from their overt scope of recommendations."⁶

It is surprising to see that the Government of India has not yet come up with any proposal of reform which might affect the administration

1. (1873-73) I IA 209.

2. Per Sir Montague Smith at 232-233.

3. ILR (1887) 12 Bom 247. Supra p. 137.

4. Ibid., p. 262. On this point see also B.K. Mukherjea, op.cit., 4th edition, 49 where the learned author cites inter alia the Bombay case and observes that "The authority, therefore, support the conclusion that supervision and control of Hindu religious and charitable institutions is a function of government and that government at all times asserted and exercised the power. Although India is today a secular state, 'that would not preclude the secular administration of religious institution'."

5. Report of the Hindu Religious Endowments Commission (1960-62), Govt. of India, Ministry of Law, Delhi, 1962, 1.

6. Derrett, "The Reform of Hindu Religious Endowments", D.E. Smith (ed.), South Asian Politics and Religion, Princeton University Press, Princeton, 1966, 311-336, 336.

of private Hindu religious endowments as a whole. The state legislatures are intermittently occupied introducing statutes covering public religious endowments; it seems that legislators may have made up their minds not to attempt any reform in the field of private endowments, because no proposal has as yet come forward to do substantial reform in that area. "The State has not cared to make any positive provision for the preservation of the private trust, and has on the contrary so acted that its interests are likely to be endangered."¹ It will be recollected that the incorporation of the private or family wakf within the scope of state Wakf Boards has not proved entirely happy: the state's interference has not rewarded those who had relied on ancient privileges and traditions. In the case of a public trust the members of the public may ventilate their suspicions about the way the management of a foundation is being run, and at least they can instil fear into the managers. Any statute affecting public trusts usually provides ways by which the public may draw the attention of Government officers to a problem which can be solved by the latter.² But in the field of private endowments the parties involved are very few, so it can be argued that the cry of the few does not or will not cause any fear in the managers and the public are not affected by any abuse in a private endowment, at least directly. But it must be contended that any abuse in either a private or a public endowment will affect the public in another way because of the existence of the secular property element in the shebaiti³ in respect of any endowment. Moreover, any abuse by the managers in any endowment, public or private, results in acquiring material benefits by individuals and it has nothing to do with any religion. These abuses or means of the shebaitis acquiring material benefits through an endowment

1. Derrett, RLSI 506.

2. Derrett, "The Reform of Hindu Religious Endowments"... 313.

3 Shebaiti is a secular property - Angurbala v. Debabrata AIR 1951 SC 293. Supra pp. 218-219.

under the cover of a religion must be stopped.

As there is no general public demand for reform in private endowments Parliament may not set up an investigatory body for reform in this field. Surely there are trained lawyers amongst the parliamentarians, as among the officials of the Judicial department, and it can be said without hesitation that most of them either in course of their academic study for the law degree or in going through the law reports have come across the notion of the juristic personality of a Hindu idol and the alleged abuses of the shebait's of private debutters as reported in the cases of different High Courts and the Supreme Court. Possibly the parliamentarians tend to ignore the cases of the shebait's' abuses in the field of private endowments and the nation's wealth involved in them for the reason that they do not affect the position of their political parties.¹ So far the Indian Legislatures have not attempted to investigate needs for reform in the field of private trusts, under the impression (doubtless) that the existing machinery was adequate.

"It must be a part of such study as this one to inquire into the validity of this convenient distinction between public and private trusts, and to see whether a comprehensive solution is not needed which will take care of the problem fundamentally. The amounts of money or extents of land involved have nothing to do with the matter. A set of stones may be a public temple within a particular statute and may have two fields endowed for its upkeep and the performance of worship; on the other hand the 'private' deity of a wealthy Bengali or Bihari family may 'own' numerous large farms. The stones may own no jewellery; the deity might own enough ornaments and valuable clothing to set many an impoverished family in the same village on its feet economically."²

Now, the Indian Parliament has consistently turned a deaf ear to rumours of malpractices and irregularities in the field of private endowments, so it should share any blame in not introducing reform in this field where

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1. "But the shebait of the family idols wields no political patronage, and whatever difficulties can be created in the realm of transfer of land, and the like by manipulations with the property of 'devata' (called 'debutter property'), the influence obtained through managership of a family trust is slight" - Derrett, "The Reform of Hindu...Endowments", 334.
 2. Derrett, ibid., p. 313.

a substantial portion of the nation's wealth in terms of money and land is involved. If

"the subject were viewed from the point of view of strict religion, of the religious benefit of the worshippers, certain reforms would suggest themselves in the family field as readily as in the public ones. Family trusts are at least as numerous, and in sum their properties cannot be less valuable. Land reforms have not hit debutter properties equally in all states, and debutter income is not accessible to income tax. One would suppose that shebaitis of any religious foundation ought to be capable of being rendered accountable whether the foundation were public or private. The spiritual objects upon which the Commission lay stress apply no less urgently here than there - and legislation actually to prevent excessive dedication to private deities would not be impossible, especially if the bogus 'private' temples were redefined as 'public'."2

It has already been pointed out that some temples in Bengal e.g. the Kalighat temple in Calcutta, should be reclassified as public institutions. The worshippers who are drawn to these temples are no less numerous than those who go into the famous public temples in both South and North India.

Again, we are bound to ask ourselves why have not individual Indian legislators expressed any desire to reform private Hindu religious endowments? More than a dozen statutes serve as machinery for controlling and administering the institution of public Hindu religious trusts in different states in India but not a single state statute is there whose purpose is to control the malpractices and maladministration of shebaitis of private Hindu religious endowments. Reasons for reforming public endowments and the considerations for not reforming private Hindu religious endowments have been suggested by Derrett, who observes that

"the spirit which works for the development and reform of the public institution works also for the decay and neglect of the private. How, again, is this? Surely religion is more meaningful in the home? Fewer Hindus worship in temples than worship in their own home. Yet the cosmopolitan intelligentsia, who desire that temples should in some manner become respectable and approximate unobtrusively to churches or cathedrals, are at the same time

1. This is no longer true. See Income Tax Act, 1961.

2. Derrett, "The Reform of Hindu...Endowments", 334-335. The Commission as referred to in the author's observation is the Commission of the Hindu Religious Endowments as mentioned earlier in the section.

people who have given up keeping an ancestral shrine and no longer perform daily worship of family idols. To them the family idol is a charming anachronism, and the fact that the institution was kept afloat chiefly by economic motives does nothing to endear it to them. If the family trusts gradually break up through neglect, if the assets gradually become secularized, if no property is dedicated to family idols, they will not care. The misuse of power by the trustees of public institutions is one thing, the decay of private institutions is another. Religion inspired both, but considerations that inspired the movements for reform in the 1960's are not religious ones."

It could be added that the reasons which led to the reform in the field of public religious trusts ignoring the much needed reform of private religious endowments impressed the legislators who introduced statutes regulating Hindu public religious trusts; they could not be entertained by Hindus in general to whom the political objects were not immediately apparent. In other words, they did not reflect the wishes of the common Hindu. Just as the pious Muslim expects thawab (heavenly reward) for his gift in wakf, not from the mutawalli's honesty, so the pious Hindu acquires punya from the dana or arpana, not from the functionary's honesty or competence.

The pre-British king was not so much concerned with the intention of the founder of an endowment as with its use for worship of a manifestation of God.² If temples were out of repair, the dedicated lands were either re-dedicated to other temples or income of the dedicated property was used in such a way as to serve a purpose similar to that wanted by the dedicator.³ Nobody can say that the present day Hinduism is different in this respect from pre-British Hinduism.

"The law should protect temples so that worshippers make their vows and pay them, may offer worship to the idol and present it with their gifts; and the law should protect mutts so

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1. "The Reform of Hindu Religious Endowments"... cited above, 335. We should prefer to say 'were not primarily religious ones'.
 2. Derrett, Critique, 380.
 3. Derrett, Ibid., p. 380.

that the educational purposes for which they were founded (subject to valid redirections) should continue to hold together the sects concerned in a common doctrine, and common form of worship, and a common path to individual salvation."¹

It is submitted that the State of India is responsible for the protection and maintenance of the existing religious endowments so that the purposes for which they have come into being may be fulfilled. It must accept some responsibility to protect endowments, not least Hindu private religious endowments which have never been subject to enquiry by any investigatory body for finding out whether the existing machinery works well. The Constitution of India does not discourage religion in any of its provisions and the institution of the Hindu private religious trust cannot be made an exception. In this context, the duty of the State is twofold: (i) to find out bogus 'private' religious endowments and redefine them as public or take them away from the managing shebait for the benefit of the society as a whole; and (ii) to protect the genuine private religious endowments thus allowing the family worshippers to satisfy their spiritual needs. The considerations for future reform in the field of Hindu private religious endowment must be religious not political ones. We are not, in saying this, reflecting in any way on the duty of endowments to contribute by way of taxation to the country's needs.

SECTION 7

RECOMMENDATIONS

The rule that all the co-shebait must join together² to make any alienation of debutter property renders the administration of debutter very difficult³ in circumstances where money may be needed for the

1. Derrett, Critique, 381.

2. Man Mohan Das v. Janki Prasad (1944-45) 49 CWN 195 (PC), 201 where the main point for determination was whether the mortgage deed executed by one of the trustees was binding on the deity.

3. Derrett, Critique, 387. *Regarding the inconveniences of co-shebait see also Nagarwali Devi v. Girjapati Tiwari AIR 1982 All 80*

protection of the endowment itself. When there are several shebaitis of an endowment the management may be in the hands of one of the shebaitis. But even the act of the majority of shebaitis including the managing shebait will bind neither the deity nor the minority of shebaitis.¹ It should be remembered that because of the effect of the Hindu Succession Act on shebaiti which is heritable and partible,² a time may come when there will be innumerable shebaitis for a particular endowment. So for the effective administration of debutter and to enable the managing shebait to alienate a portion of the debutter for meeting legal necessity speedily for the protection of the endowment itself, the new law should incorporate provision, in addition to what has already been suggested in this respect in section six of this chapter, to the effect that when a managing shebait has been able to get the consent of the majority of competent shebaitis to make an alienation, in case of legal necessity he should be legally entitled to make it, the alienation being in any case voidable.³ The old law relating to a widow's right to adopt in Madras may be cited as

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1. B.K. Mukherjea, op.cit., 4th ed., 251. See above, p. 218.
 2. Angurbala v. Debabrata AIR 1951 SC 293, *supra*, p. 348; Laxmidhar v. Rangabati Bewa AIR 1967 Ori 90, 92, M.N. Das, Laws Relating to Partition, 2nd ed. Eastern Law House, Calcutta, 1981, 568. It is strange to see that the whole of the fourteenth chapter (called Debutter) of the learned writer's book covering about eighty pages deals with debutter as a whole where about six pages (pp. 565-567 and pp. 574-576) only have been devoted to the laws about partition of debutter and shebaiti. The treatment of the question of debutter covering so much space in a book on laws of partition seems to be very irrelevant. Moreover, it is not at all understandable why the author has treated the subject of Islamic wakf in the midst of the chapter (pp. 530-535). Moreover, in dealing with wakf he has not cited at all the two important cases of Abul Fata (1893-94) 22 IA 76 and Fazlul Rabbi, AIR 1965 SC 1722. These two cases are as important and indispensable for Islamic wakf as Prosunno Kumari's case (1974-75) 2 IA 145 and Angurbala's case AIR 1951 S.C. 293, for Hindu debutter.
 3. "The rule should be that where a majority of shebaitis in the line of management or interest as it was constituted immediately before the enactment of HSA approve a transfer or scheme of management this should be binding on the idol (cf. the family arrangement) notwithstanding

(continued on next page)

an appropriate analogy: the want of consent of some sapindas used to be ignored.¹

Again the general rule that all the shebait must be co-plaintiffs in a suit instituted on an idol's behalf² to recover possession either of the idol's property held adversely by a stranger or money payable to the endowment, should be abandoned for a new approach which should allow any of the co-shebait to sue on the idol's behalf to recover either its property or any money payable to it. The present procedure delays the recovery of the possession of the deity's property and the possibility exists that the deity might lose the property altogether by the operation of the Law of Limitation. It has been held that where a deity was represented by some but not by all the shebait the test was whether the deity's interests were sufficiently represented by those shebait.³ This is obviously a most fruitful line to develop and it is strange that we have no recent authorities proceeding in the same direction.

(continued from previous page)

objections later raised by other shebait belonging to other families and less directly concerned with the endowment" - Derrett, Critique, 387. Here the expression 'HSA' means the Hindu Succession Act, 1956.

1. T. Naidu v. K. Naidu AIR 1970 SC 1673, 1679; C.S.V. Sharma v. Ramalakshamma AIR 1972 AP 270, 273-274; see Mulla's Hindu Law, 14th ed. N.M. Tripathi, Bombay, 1978, p. 532, where the Supreme Court case has been referred to and it has been observed that "the consent necessary to validate the adoption is not the consent of every sapinda, however remote... The starting point relating to the doctrine of consent of the sapindas was first enunciated by the Privy Council in the case of Collector of Madura popularly known as the Ramnad case... It was developed by the decisions of the Privy Council and the Madras High Court and culminated in the decision of the Supreme Court in Tahsil Naidu v. Kulla Naidu... The consent required is that of a substantial majority of the nearest sapindas who are capable of forming an intelligent and honest judgement in the matter...."
2. Nirmal Chandra v. Jyoti Prasad AIR 1941 Cal 562, 567 and Sree Sree Sreedhar Jew v. Kanta Mohan AIR 1947 Cal 213, 219.
3. On this point see Jyoti Prasad v. Jahar Lal AIR 1945 Cal 268, 278 and Prabir Chandra v. Panchanan AIR 1957 Cal. 117, 118.

The problem relating to the question who may sue on behalf of a private deity and under what circumstances, calls for an immediate solution. For time spent on procedural steps may damage the deity's interests. To simplify procedure and concentrate on the substance of a case was the effect of the famous observation quoted above (p.328) of Subba Rao J. in Biswanath v. Radha Ballabhji¹ which laid down the rule that "a prolonged and a complicated"² procedure should be abandoned to save the interests of the deity.

Again, in so far as a Hindu public religious endowment is concerned, the procedure under Section 92 is complicated even after its amendment in 1976. The procedural aspect of Section 92 that a suit under the section cannot be instituted by more than one person interested in an endowment without prior permission of the Court, can be abandoned. For it will delay the remedy needed for an endowment; whether "the plaintiff, or next friend, is entitled to commence proceedings on the idol's behalf would normally be raised by the defendant in any event and will be before the court as a preliminary issue".³

Section 92 of the Code of Civil Procedure even as amended in 1976 is applicable only when a suit is related to one of the reliefs provided in the section⁴ and a declaratory suit relating to the property rights of the deity is not contemplated in the section and the limitation of the section

1. AIR 1967 SC 1044.

2. Ibid., p. 1047; Abu Backer v. Advocate-General, Madras ILR (1954) 1 Tra-Co., 369, 387, see above, section 5 of this chapter; Swami Shantanand Saraswati v. Advocate-General ILR (1956) 1 All 609, 610, see above, section 5 of this chapter.

3. Derrett, IMHL 505.

4. Pragdasji v. Iswarlal Bhai AIR 1952 SC 143, 144; Harendra Nath v. Kali Ram Das AIR 1972 SC 246, 250, Vidya Sagar v. Anand Swarup AIR 1981 All 106, 109, infra this section.

can be avoided in the way shown by the Supreme Court in Biswanath's case.¹

In that case the Supreme Court has in effect laid down the rule that if ~~none~~ of the reliefs claimed in a suit is covered by the provision of the section it must not be taken that the plaintiff has no other remedy. There the reliefs claimed were both the recovery of a declaration that the property belonged to the deity and possession of the deity's property. Subba Rao, C.J. observed that

"The present suit is filed by the idol for possession of its property from the person who is in illegal possession thereof and, therefore, it is a suit by the idol to enforce its private right. The suit also is for a declaration of the plaintiff's title and for possession thereof and is, therefore, not a suit for one of the reliefs mentioned in S. 92 of the Code of Civil Procedure and therefore, the said section is not a bar to its maintainability."²

Thus the effect of the statement is that what is not within the purview of any particular section should not be taken to mean that it is barred by that section. This ruling of the Supreme Court was followed in Vidya Sagar v. Anand Swarup,³ where the pujaris were claiming the temple to be their private institution and contended inter alia that the suit was barred under section 92. The Allahabad High Court ruled that the suit in question was maintainable in spite of the fact that requirements of section 92 were not complied with. Technicalities of law should not delay justice.

In this context, an important curiosity is that plaintiffs successful in suits for possession of the deity's property improperly alienated are not entitled to actual possession of the property during the tenure of the dishonest shebait. "A contract for a permanent lease of a debutter property cannot certainly be enforced in the absence of any legal necessity"⁴

1. AIR 1967 SC 1044.

2. AIR 1967 SC 1044, 1046.

3. AIR 1981 All 106, 109.

4. Ponnambala Desikar v. Periyanan Chetti (1935-36) 63 IA 261, 274

but when the grant has already been made by a shebait, the correct position seems to be that it is operative at least during the tenure of office of the grantor",¹ but it can be operative on a permanent basis "even after his death if the next incumbent privately comes to terms with the occupiers of the property".² It must be pointed out that the present position of law is intolerable. It encourages malpractices, especially collusion in the administration of the debutter. The deity or the endowment must not be dispossessed of its property even for a short time when a plaintiff is successful in a litigation for recovery of the possession of the debutter. The law³ gives the shebait the right to possess and manage the deity's property not to encourage him to indulge in malpractices in his administration of the debutter or to collude with a third party to let him possess the property adversely to the deity's interests.⁴ The law should be that the deity's property wrongfully alienated by a shebait can be recovered from the occupier immediately after the plaintiff is successful in a suit to recover the possession of the debutter. The question of the shebait's right of property in the debutter is a separate question, but legislation (in our submission) is needed to terminate the right of a mala fide purchaser to retain debutter property for the duration of a corrupt or incompetent shebait's tenure of his shebaiti. The old analogy with the right of a mala fide purchaser from a widow to enjoy the property for the widow's life is most inappropriate, since although the shebait represents the deity and has property in his shebaiti and in the debutter (until this is abolished) the debutter does not exist for his enjoyment as the widow's estate existed for the widow.

1. B.K. Mukherjea, op.cit., 4th ed., 287. 2. Derrett, Critique, 384.

3. Jagadindra Nath Roy v. Hemanta Kumari (1903-4) 31 IA 203.

4. Bhagabat v. Ajodhya Das AIR 1978 Ori 194, 198. In that case, the shebait acted adversely to the deity's interest by executing an illegal sale deed in respect of the endowed properties.

The present uncertainty regarding the question who can sue on behalf of the deity should be settled by a statutory provision. A Supreme Court decision on the question is not enough, because decisions may differ on the same point. Thus the Court (contrary to the case of Biswanath v. Radha Ballabhji)¹ laid down in Ram Raghava Reddy v. Seshu Reddy² that a bare worshipper had no right to sue on the deity's behalf to recover possession of the deity's property.³ Varadachari⁴ follows this view in the second edition of his book when the learned author observes that "The right of the worshipper to sue in the name of the idol is limited only to getting a declaration that an alienation is not binding on the deity. Since the worshippers do not exercise the deity's power of suing, they are not entitled to recover possession of the property." How can such a dichotomy be justified? In Biswanath v. Radha Ballabhji⁵ it was held that a bare worshipper could maintain suits on behalf of an idol.⁶ In the latter case the Court in effect ruled that a person either a member of the family or a stranger to the family having either spiritual or material interest in a family endowment was entitled to conduct suits on behalf of the deity for the recovery of the possession of the debutter from the hands possessing it adversely. But it is implied that the stranger's interest must be a continuing interest as that of the plaintiff in the Supreme Court case who took an active part in the worship of the deity and also helped the then shebait in the management of the debutter. In these circumstances the person may be a stranger but not to the endowment. Anyway, whether a person is a complete stranger to the endowment or to the family can be judged by the Court from the circumstances of a case.

1. AIR 1967 SC 1044.

2. AIR 1967 SC 436.

3. Ibid., p. 440, para 10.

4. At p. 300.

5. AIR 1967 SC 1044.

6. Ibid., p. 1047.

"It would be better to refashion all the remedies by legislation but while that is pending the courts can themselves clarify the rights of persons interested in the endowment. The latter should sue on behalf of the compendious expression of the pious purpose which is symbolised by the idol or the mutt, and thus in the idol's or mutt's name, and the court should apply its mind not primarily to the locus standi of the plaintiffs or applicants, as at present, but rather to the merits of the matter."¹

What Derrett suggests is definitely meant for the institution of the Hindu private religious endowment and it is where we have seen the State in India to be apathetic. Again, it may be added that a legislative reform is needed in this field and any future legislation relating to the subjects of suits in relation to the idol or debutter must incorporate in it the principles laid down in the Biswanath's case.² In my opinion the Supreme Court's judgement in the case is a gem of a decision.

1. Derrett, Critique, 384.

2. AIR 1967 SC 1044.

CHAPTER VI

MATHSSECTION 1

(a) THE NATURE OF A MATH, (b) MAHANT AND MAHANTSHIP and (c) THE APPOINTMENT OF MAHANTS

a. The Nature of a Math

A math (Sanskrit Matham, Anglo-Indian 'mutt'¹) in its original and narrow sense signified the abode of an ascetic or a sanyasi.² In Swami Harbansa Chari Ji v. State³ where the plaintiff brought the suit for a declaration that he was the successor mahant of a so-called math which was in fact a temple, the Madhya Pradesh High Court held that "Math in ordinary language signifies an abode and residence of ascetics".⁴

Sankaracharya founded many Hindu maths in competition with powerful institutions of both the Buddhists and Jainas.⁵ In Giyana Sambhanda v. Kandasami Tambaran⁶ where the main contention of the plaintiff was related to a declaration that certain maths of Tiruppanandal and Benares were subject to his and his successors' control, the Madras High Court held that

"when the Buddhists assailed the Brahminical religion and when Sankarachariyar,⁷ the founder of the Advaita or non-dualistic school of philosophy, ultimately prevailed against them, he established some mutts in order to maintain and strengthen the

1. Derrett, IMHL, 510.

2. Varadachari, op.cit., 2nd ed., 115.

3. AIR 1981 MP 82.

4. Ibid., p. 87.

5. Derrett, IMHL, 511.

6. ILR (1887) 10 Mad 375.

7. "The origin of these mutts is traceable to the times when Buddhism had a powerful hold upon the masses in India and Sankaracharya, the leader of Brahminical doctrines, led the opposition against the Buddhists. With a view to counteracting the activities of the Buddhists and to serve at centres of religious instruction and philosophy, he started mutts presided over by learned and pious ascetics after the model of the Buddhist order of monks..." - Raghavachariar, op.cit., vol. I, 7th ed. 1980, 642.

doctrine and the system of religious philosophy he taught, sanyasis being placed at the head of those institutions."¹

But in its legal parlance a math "connotes a monastic institution presided over by a superior and established for the use and benefit of ascetics, belonging to a particular order, who generally are disciples or co-disciples of the superior".² The superior of a math called mahant or mathadikari "is the spiritual guide of a sect or sub-sect, and often acts as caste head, settling disputes and serving as an authority in matters of conscience."³

Like a college, a math is an institution which exists normally for the advancement of religious education.⁴ In Vidyapurna v. Vidyanidhi⁵ where the main question for determination was whether the lunacy of a mahant could divest him of his mahantship Sir Subramania Aiyar, O.C.J., observed for the Madras High Court that the maths "were established as centres of theological learning, and in order to provide a line of competent teachers with reference to the established Hindu creeds of the Country".⁶ But unlike a college having many fellows it has only one representative, i.e. the mahant or the head of the math who is normally its manager, but in many cases persons interested in the math "have a say at critical moments in the life of the math, as for example when a mahant is to be appointed or recognized or deposed".⁷

Again, a math like the deity of a debutter is a juridical person.⁸

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1. ILR (1887) 10 Mad 375, 386. For the origin of maths see also Sammantha v. Selappa ILR (1879) 2 Mad 175, 179 and Ganeswara Giri v. Som Giri AIR 1949 All 718, 721-722.
 2. Mukherjea, op.cit., 4th ed. 321. The view was accepted and Mukherjea's observation was quoted by the Supreme Court in Krishna Singh v. Mathura Ahir, AIR 1980 SC 707, 713, see below, this section.
 3. Derrett, IMHL, 511. 4. Derrett, ibid., p. 511. 5. (1904) 14 MLJ 105.
 6. Ibid., p. 107. 7. Derrett, IMHL, 511.
 8. Babaji Rao v. Laxman Das ILR (1904) 28 Bom 215, 223; Vidya Varuthi v. Balusami (1920-21) IA 302, 311; Ongole Byragi Mutt v. Kannayya AIR 1960 AP 98 (FB), 99-100, Krishna Singh v. Mathura Ahir AIR 1972 All 273, 279; Lakshmi Narayan v. State AIR 1978 Pat 330, 333; Pushpagiri Mutt v. Ramalinga Sastri (1979) 1 MLJ 54; Krishna Singh v. Mathura Ahir AIR 1980 SC 707, 726.

"It is a characteristic of Hindu law that property should be owned by deities (idols) and by maths (religious institutions like colleges)."¹
 In Krishna Singh v. Mathura Ahir² where the main point for decision was whether a Sudra being ordained to a religious order could become a sannyasi and thus could become a mahant of a math, the Supreme Court held that "According to the Hindu jurisprudence, a religious institution such as a math is treated as a juristic entity with a legal personality capable of holding and acquiring property."³

In Babaji Rao v. Laxmandas⁴ the mahant instituted the suit to recover the possession of a house belonging to the math in question, Sir Lawrence Jenkins, C.J., pronounced for the Bombay High Court that

"A math, like an idol in Hindu law is a judicial persona⁵ capable of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency. When the property is vested in the math, then litigation in respect of it has ordinarily to be conducted by, and in the name of the manager, not because the legal property is in the manager but because it is the established practice that the suit would be brought in that form..."⁶

A math is a religious institution sui generis⁷ and unlike a temple where

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1. Derrett, "The Concept of Property in Ancient Indian Theory and Practice", AIR 1968 Jnl. 2-8, 3.
 2. AIR 1980 SC 707. The Supreme Court affirmed the decision of the Allahabad High Court in Krishna Singh v. Mathura Ahir AIR 1972, All, 273. Derrett appreciates Kirty, J. of the Allahabad High Court for his excellent judgement in the case. See "Common Sense in Hindu Law a Splendid Decision from Allahabad", 1972, KLT Jnl. 89-92: Both the High Court and the Supreme Court decisions have been praised by W.F. Menski in his article "Sudra Sannyasis: A Piece of Realism in Hindu Law" (1981) 2 MLJ Jnl. 25-26. Menski points out (at p. 25) that the Supreme Court has rediscovered "a basis of entitlement to be a sannyasi which had been overlooked...during the British period."
 3. Per Sen, J., ibid., p. 726.
 4. ILR (1904) 28 Bom 215.
 5. Similarly a gurdwara is also a juristic person. See Piara Singh v. Shri Guru Granth Sahib AIR 1973 P & H 470, 471.
 6. ILR (1904) 28 Bom 215, 223.
 7. Derrett, IMHL, 510.

the presiding element is the deity,¹ the presiding element of a math is its mahant.² The primary object³ of a temple is the worship of the deity but in the case of a math the worship of the deity attached to it is a secondary matter;⁴ however, it is the essence of a math that religious instruction is imparted.⁵ It must be stressed that the common object of both maths and temples is the same, in the sense that both types of institutions are meant for the spiritual welfare of mankind. In Vidyapurna v. Vidyanidhi⁶ Sir Subrahmanya Ayyar, O.C.J. pronounced on the point when his Lordship observed that

"The two classes of institutions, viz, temples and mutts, are ...supplementary in the Hindu Ecclesiastical system, both conducing to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge - the presiding element being the deity or idol in the one, the learned and pious ascetic in the other."

But the aforesaid observation of Sir Subrahmanya Ayyar was not accepted by G. Sarkar Sastri when the latter commented that "It is, however, submitted with great deference that the deity is the presiding element in both, there being no math without its deity: the worship is prominent in both, but religious knowledge is added to it in one of them".⁸ With due respect

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1. Vidyapurna v. Vidyanidhi ILR (1904) 27 Mad 435, 454.
 2. Krishna Singh v. Mathura Ahir AIR 1980 SC 707, 713; Swami Harbansa Chari Ji v. State AIR 1981 MP 82, 87.
 3. "Mutts...are distinguished from temples in which property is dedicated for the worship of a god primarily for spiritual purposes, and the worshippers are beneficiaries in a spiritual sense..." - G. Sarkar Sastri, A Treatise on Hindu Law, 6th ed. Eastern Law House, 1927, 761.
 4. Thambu Chetti v. A.T. Arundel ILR (1882) 6 Mad 287, 288; Varadachari, op.cit., 117.
 5. Abhinav Vidyatirth v. Charity Commr. AIR 1967 Bom 194, 198, affirmed by the Supreme Court in Charity Commr. v. Shringeri Math AIR 1969 SC 566, 569 = (1969) 71 Bom LR 678 SC, 681.
 6. ILR (1904) 27 Mad 435 = 14 MLJ 105.
 7. ILR (1904) 27 Mad 435, 454.
 8. Op.cit., 6th ed., 762.

to the learned author it may be pointed out that the essential difference between a math and a temple is that the former is essentially an educational centre¹ for imparting religious or spiritual learning and the worship of a deity is not its primary purpose.²

Again a math even without a deity may be found to exist. In Swami Harbansa Chari Ji v. State³ where the main issue was related to the succession of mahantship, Varma J. observed for the Madhya Pradesh High Court on the point that

"The presiding element in a math is an ascetic or a religious teacher. With his disciples and co-disciples, he forms a spiritual family... The primary purpose of the math is to encourage and foster spiritual learning. Competent teacher imparts religious instructions to the disciples who are followers of the particular school or order... The worship of God was not excluded if it was essential as a part of the religious teachings of a particular math. It cannot, however, be said that there cannot be a math without an idol".⁴

In general, maths are of three types,⁵ namely, maurusi, panchayati and hakimi. In maurusi or appointable maths the existing mahant usually makes the choice of his successor.⁶ In the case of a panchayati⁷ or elective math the new mahant is elected either by the committee of mahants or other maths or by the effective leadership of a sect or a caste.⁸ In hakimi or nominative maths the mahants are appointed by the ruler⁹ or a descendant

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1. See the Report of the Hindu Religious Endowments Commission, op.cit., 20, where it was observed that "A close study of the origin and development of mutts in the country would show that they were started mainly for the purpose of imparting instruction in various forms of Hindu religion and philosophy and conducting religious propaganda".
 2. See Mukherjea, op.cit., 4th ed. 331 where the author has expressed the same view and disagreed with Sarkar Sastri on the point at issue.
 3. AIR 1981 MP 82.
 4. Ibid., p. 87.
 5. See Mohunt Rama Nooj Doss v. Mohunt Debraj Doss (1839) 6 SDA 328, 336; Ram Parkash Das v. Anand Das AIR 1916 PC 256, 257 see below, p. 364.
 6. See Tulasiram v. Ramprasanna AIR 1956 Ori 41 where the dispute was related to the nomination of the successor of a mahant of a Vaishnab maurusi math, the Orissa Court held if there were more chelas or disciples than one, a mahant had a right to appoint one of them as his successor. See p.47.
 7. Sital Das v. Sant Ram, AIR 1954 SC 607, a case relating to an institution belonging to the Ram Kabir sect of Hindu Bairagis and Sarju Dass v. Bhag Dass AIR 1961 Punj 364 where the mahant committed an offence under the Indian Penal Code, are the cases of panchayati or elective maths.
 8. Derrett, IMHL 513.
 9. Mukherjea, op.cit., 4th ed. 357.

of the ruling house or by the party who made the endowment.¹ Maurusi maths are the more common type but the least common are hakimi.²

b. Mahant and Mahantship

The head of a math is called the mahant³ or mathadikari⁴ who is generally its manager or custodian.⁵ In Sarangadeva v. Ramaswami⁶ where the plaintiff instituted the suit to recover the possession of lands belonging to a math which were granted to his predecessors on a perpetual lease and where upon the verdict of the Supreme Court he acquired title to the suit lands by adverse possession, the Supreme Court following Vidya Varuthi v. Balusami Ayyar⁷ pronounced that "A mathadipathi is the manager and custodian of the institution... The office carries with it the right to manage and possess the endowed properties on behalf of the math and the right to sue on its behalf for the protection of those properties."⁸ A mahant may of course have private properties of his own.⁹

As the manager of a math the mahant represents the math either as a plaintiff¹⁰ or as a defendant in all suits brought on behalf of or against the math. In Guranditta v. Amar Dass¹¹, where the main point for determi-

1. Sarkar Sastri, op.cit., 6th ed. 761.
2. Derrett, IMHL, 513.
3. "The word 'mahant' means 'respected' and 'one whose desires for earthly belongings have been put to an end to'" (sic) R.P. Arora, "Rights and Duties of Mahants", (1950) 4 Indian Law Review, 235-248, 235.
4. Varadachari, op.cit., 2nd ed., 511.
5. Derrett, IMHL, 511.
6. AIR 1966 SC 1603.
7. (1920-21) 48 IA 302. *Supra*, p. 217.
8. Per Bachawat, J., AIR 1966 SC 1603, 1606.
9. Math Sauna v. Kedar Nath AIR 1981 SC 1878, 1880 = (1982) 19 GLT SC 6. See below, section 2.
10. Derrett, IMHL, 515.
11. AIR 1965 SC 1966.

nation was related to the question of the starting point of¹ adverse possession of land belonging to an Akhara of Amritsar which was alienated by the deposed mahant without any legal necessity, Mudholkar, J. held that "a Mahant of an Akhara represents the Akhara and has both the right to institute a suit on its behalf as also the duty to defend one brought against it".²

As long as he manages the endowed property, a mahant seems to be on the same footing as the shebait of an idol's property. But the main difference between them is the position of a mahant which implies the office of a religious preceptor as well. In Krishna Singh v. Mathura Ahir³ Sen, J. pronounced for the Supreme Court that "a math is an institutional sanctum presided over by a superior who combines in himself the dual office of being the religious or spiritual head of the particular cult or religious fraternity, and of the manager of the secular properties of the institution of the math."⁴

Again, there can be more than one shebait for a temple but in the case of a math there is only one mahant.⁵ The shebait of a deity is not entitled to the offerings⁶ made to the deity whereas the mahant has not only an absolute right to the income of the offerings made to him personally but also has complete control over all the offerings made to the math.⁷

Mahantship, like shebaiti, is an amalgam of office and property, but

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1. In deciding this point the Supreme Court relied on Subbaiya v. Mahamad Mustapha (1922-23) 50 IA 295 which was related to the recovery of the possession of endowed lands belonging to an endowment of food chattaram and other objects and Mahant Sudarsan Das v. Mahant Ram Kirpal (1949-50) 77 IA 42 where the mahant claimed title to a share of the endowed property belonging to another math (asthal).
 2. AIR 1965 SC 1966, 1969. 3. AIR 1980 SC 707 4. Ibid., p. 713.
 5. Gobinda Ramanuj v. Mohanta Ramcharan ILR (1936) 63 Cal 326, 343.
 6. Manohar Ganesh v. Lakhmiram Govindram ILR (1887) 12 Bom 247, 265, supra p. 137.
 7. See Lakshmi Narayan v. State AIR 1978 Pat 330, Below, p. 363; Varadachari, op.cit., 119.

unlike shebait it is neither partible¹ nor (in the ordinary sense) heritable.² Thus in Commissioner, H.R.E. v. L.T. Swamiar³ B.K. Mukherjea, J. as he then was, observed for the Supreme Court that

"in the conception of mahantship, as in shebaitship, both the elements of office and property, of duties and personal interest are blended together and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties; and these and other rights of a similar character invest the office of the Mahant with the character of proprietary right, which, though anomalous to some extent, is still a genuine legal right. It is true that the mahantship is not heritable like ordinary property..."⁴

A mahant being a spiritual teacher of a sect or a caste has "ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, governed by custom and usage".⁵ The point that he has ample powers of disposition of trust funds has been reiterated by the Patna High Court in Lakshmi Narayan v. State⁶ where Agarwal, J. observed that

"the position of the Mahant...is that the property of a math is held by him as the spiritual head of the institution. In the conception of Mahantship, as in shebaitship, both the elements of office and property are blended together and neither can be detached from the other, but a Mahant, in addition to his duties, has a personal interest of a beneficial character larger than that of a shebait in a debutter property".⁷

The position of the head of a math or a mahant was explained long ago

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1. Sethuramaswamiar v. Meruswamiar (1917-18) 45 IA 1, 9, Ramcharan Ramanuj v. Gobinda Ramanuj (1928-29) 56 IA 104, 110.
 2. On maurusi maths see above, p. 360; Commissioner, H.R.E. v. L.T. Swamiar AIR 1954 SC 282, 288. Supra, pp. 16-21.
 3. AIR 1954 SC 282.
 4. Ibid., p. 288.
 5. Vidya Varuthi v. Balusami Ayyar (1920-21) 48 IA 302, 311.
 6. AIR 1978 Pat 330, a case relating to four deities of two temples in the district of Rothas, Bihar.
 7. Ibid., p. 333. But unlike the interest of a shebait in a debutter the interest of a mahant in a math property completely ceases after his death and does not pass to any heir. See Controller of Estate Duty, Bihar v. Mahant Umesh Narain Puri (1982) 2 SCC 303, 309.

in Ram Parkash Das v. Anand Das¹ where the main issue to be decided by the Privy Council related to the office and rights of a mahant. Lord Shaw pronounced that,

"The mahant is the head of the institution. He sits upon the gaddi; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself."²

But the point that the property of the math is held in 'trust' by its mahant was clarified in the decision in Vidya Varuthi's case³ where Mr. Ameer Ali pointed out that the property of a math did not vest in a mahant; he was not a trustee in the English sense but "he is answerable as a trustee in the general sense for maladministration".⁴

In the conclusion of this study it may be pointed out that like the institution of math, mahantship is an institution sui generis. He is neither a trustee in the English sense nor an owner of the trust property but is accountable as a trustee in respect of obligations and duties imposed on him.⁵ Though he is not the owner of the 'trust' property, in view of his office, like an ordinary owner of a property, he is himself a beneficiary of the 'trust' property.⁶

c. The Appointment of Mahants

If the founder of a math lays down any particular rule of succession to mahantship then that rule is to be adhered to.⁷ Otherwise, the

1. AIR 1916 PC 256.

2. Ibid., p. 257. The word 'trust' is commonly recognised to be used here in a loose sense. See below.

3. (1920-21) 48 IA 302.

4. Ibid., p.311. On this point see Commr. H.R.E.v.L.T. Swamiar AIR 1954 SC 282, 288 and S.T. Swamiar v. H.R. & C.E. AIR 1963 SC 966, 971.

5. Vidya Varuthi v. Balusami Ayyar (1920-21) 48 IA 203, 11.

6. Commr. H.R.E.v.L.T. Swamiar AIR 1954 SC 282, 288.

7. Sital Das v. Sant Ram AIR 1954 SC 607, 609, a case when the suit was brought for the recovery of alienated lands on lease belonging to a Thakurdwara of the Ram Kabir sect of Hindu Bairagis, see Mahant Bhagwan v. Girija Nandan AIR 1972 SC 814, 817 where B.K. Mukherjea's observation in his book on the point was quoted. On this point see also Mukherjea, op.cit., 4th ed., 347.

appointment or the succession to the office of a mahant is determined by custom.¹ This is a settled law supported by uniform ruling of the Courts of all levels.

In Greedharee Doss v. Nundokissore Doss² the question to be determined was the succession of a mahant "of the Akara of an endowed religious monastic institution of professed ascetics at Rajgunge in the district of Burdwan".³ Lord Romilly pronounced for the Judicial Committee that

"It is to be observed that the only law as to these Mohunts and their offices, functions, and duties, is to be found in custom and practice which is to be proved by testimony..."⁴

In Mahalinga Thambiran v. Arulnandi Thambiran⁵ where the main issue was related to the question of the validity of an appointment of a junior mahantship of the Kashi Math, Mathew, J. held for the Supreme Court that,

"Succession to the office of a Mahant or Head of a Mutt is to be regulated by the custom of the particular Mutt and one who claims office by right of succession is bound to allege and prove what the custom of the particular institution is, for the only law regulating succession to such institutions is to be found in the custom and practice of that institution..."⁶

Again in Krishna Singh v. Mathura Singh⁷ Sen, J. reiterated the law at issue when his Lordship pronounced for the Supreme Court that,

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1. Greedharee Doss v. Nundokissore Doss (1866-67) 11 MIA 405, 428, Genda Puri v. Chhatar Puri (1885-86) 13 IA 100, 105, Ramalingam Pillai v. Vythilingam Pillai (1892-93) 20 IA 150, 154; Lahar Puri v. Puran Nath (1914-15) 42 IA 115, 118; Ram Parkash Das v. Anand Das AIR 1916 PC 256, 257, Nataraja Thambiran v. Kailasami Pillai (1920-21) 48 IA 1, 8 though it was not mentioned there that custom determined the succession of mahantship of the math, it could be read that the head was entitled to nominate his successor according to the custom of the math; Satnam Singh v. Bhagwan Singh AIR 1938 PC 216, 217; Sital Das v. Sant Ram AIR 1954 SC 606, 609; Mahanth Bhagwan v. Giriya Nandan AIR 1972 SC 814, 817; Rajendra Ram v. Devendra Doss AIR 1973 SC 268, 271-272; Mahalinga Thambiran v. Arulnandi Thambiran AIR 1974 SC 199, 202; N.P.V. Hiremath v. V.S.M.K. Hiremath AIR 1976 Knt. 103, 107; Ramji Jankiji v. Mauni Baba AIR 1978 Pat 49, 53, Mahant Amar Parkash v. Parkashanand (1979) 1 S C J 516, 518 = AIR 1979 SC 845, 847; Krishna Singh v. Mathura Ahir AIR 1980 SC 707, 716; Swami Harbansa Chari J. v. State AIR 1981 MP 82, 88. See also G.D. Sontheimer, Indology and Law, op.cit., 342-3.
 2. (1866-67) 11 MIA 405.
 3. Ibid., p. 405.
 4. (1866-67) 11 MIA 405, 428.
 5. AIR 1974 SC 199.
 6. AIR 1974 SC 199, 202.
 7. AIR 1980 SC 707.

"The law is well-settled that succession to mahantship of a math or religious institution is regulated by custom or usage of the particular institution, except where a rule of succession is laid down by the founder himself who created the endowment."¹

The question of the succession of mahantship cannot be determined by an appeal to the general customary law; it must be regulated by the custom and usage of a particular institution.² In Ram Parkash Das v. Anand Das³ Lord Shaw held that

"The question as to who has the right to the office of mahant is one, in their Lordships' opinion, which, according to the well-known rule in India, must depend upon the custom and usage of the particular math or asthal.⁴ Such questions in India are not settled by an appeal to general customary law; the usage of the particular math stands as the law therefor".⁵

Now the right to nominate or appoint the successor is usually appurtenant to the office of a mahant.⁶ Where the mahant of a math is bound to celibacy, it is often the usage that he nominates the succeeding mahant either by appointment during his lifetime⁷ or by will.⁸ Thus in Mahalinga Thambiran v. Arulnandi Thambiran⁹ the Supreme Court held that "where the head of a religious institution is bound by celibacy, it is frequently the usage that he nominates his successor by appointment during his own lifetime, or by will."¹⁰ In that case the mahant nominated his chela by a will but by a

1. AIR 1980 SC 707, 716.

2. Ramji Jankiji v. Mauni Baba AIR 1978 Pat 49, 53.

3. AIR 1916 PC 256.

4. "Asthal" means math - see AIR 1916 PC 256, 257.

5. AIR 1916 PC 256, 257.

6. "The right of nomination of a successor is an incident of the office of a mahant. Maintenance of a competent line of teachers being the principal purpose in establishing a mutt, the mahant knows best how to perpetuate the line and has the inherent power of nominating the successor. He has to see who is the Sat-sishya" - Varadachari, op. cit., 127.

7. Mayne's Hindu Law, op.cit., 10th ed., 939.

8. Mahalinga Thambiran v. Arulnandi Thambiran AIR 1974 SC 199, 202.

9. Ibid.

10. AIR 1974 SC 199, 202, see also Ramalingam Pillai v. Vythilingam Pillai (1893) 20 IA 150 where the custom as accepted by the Privy Council was that the dharmakarta in office nominated his successor shortly before his death (see p.154).

subsequent will be cancelled the nomination. The main point for decision was whether the mahant could cancel the nomination without a good cause. The Supreme Court found that the cancellation of the nomination by the mahant was bad and the plaintiff was held entitled to succeed to the mahantship on the death of the existing mahant. Now reverting to the question of the power of a mahant to appoint his successor it may be pointed out that the Supreme Court, following the decision in Giyana Sambandha's case,¹ held that,

"it is clear that the custom in the Kasi Mutt is for the head of the mutt for the time being to nominate a successor to succeed him from among the Thambirans of Thirukkuttam of the Dharmapuram Adhinam; that the nomination is made by will and it is attended by certain religious ceremonies..."²

The appointment of a successor must be made by the mahant, taking into consideration the interests of the math. If the power of the mahant to nominate his successor is exercised corruptly or for ulterior reasons the appointment will be held invalid.³ In Nataraja Thambiran v. Kailasami Pillai⁴ where the appointment of the succeeding mahant was made to avoid the risk of a criminal prosecution for forgery of a will and was not made in the interests of the math,⁵ the Privy Council held the appointment of the appellant (Nataraja) as mahant invalid.⁶ So the law as it stands now is that the power of a mahant to choose his successor must be exercised in the interests of the institution and must not be used for an ulterior motive, otherwise the appointment will not be a valid one.

The right to nominate a successor is a personal right⁷ of a mahant

1. ILR (1887) 10 Mad 375.

2. AIR 1974 SC 199, 202.

3. Nataraja Thambiran v. Kailasami Pillai (1920-21) 48 IA 1, 11-12; Mahalinga Thambiran v. Arulnandi Thambiran AIR 1974 SC 199, 202.

4. (1920-21) 48 IA 1.

5. See also Vaidyanatha Ayyar v. Swaminatha Ayyar AIR 1924 PC 221, 225-226 where the appointer of a trustee of an endowed property (chatram or choultry) appointed the manager of the endowed property and claimed it to be his personal property, the Privy Council held the appointment invalid and the property concerned was a public trust (see p.224). The ruling of the Privy Council indicates that had the appointment been in the interests of the endowment the Judicial Committee would have held it valid.

6. (1920-21) 48 IA 1, 11-12.

7. Mukherjea, op.cit., 4th ed. 353.

and his right to do so cannot be delegated.¹ In Mahant Ramji Dass v. Lachhu Das² the main question for determination was related to the validity of an appointment of the mahant. In that case the sitting mahant of an asthal called Alak Dass delegated his power of appointing his successor to another mahant of Mirzapur asthal by an arrangement (ekrarnama). The Calcutta High Court held that

"Mahant Alak Dass had no power to ignore... custom and practice of election and give to the Mahant of Mirzapur the right of naming or appointing his own successor."³

Though a mahant cannot delegate his power of choosing his successor which is his personal right,⁴ he has the right to delegate his ministerial duties for the sake of convenience. In Gobinda Ramanuj v. Mohanta Ramcharan Ramanuj⁵ which was concerned with the famous math of the Ramanuj sect situated in the district of Midnapore and where the validity of a will of the mahant of the main math creating mahantship of a subordinate asthal, situated at a distance of fourteen miles, was challenged, the Calcutta High Court held that "a delegation of the ministerial duties of a shebait" by an arrangement "would be sufficiently justified on the ground of convenience, the asthals being situated 14 miles apart."⁶

Now in the case of a math of recent origin it may be possible to find out the intention of the founder who may have laid down the rules of devolution of mahantship.⁷ The development of a clear common law has not been possible in case of devolution of mahantship because of the existence of various customs obtaining in different maths regarding the succession of mahantship.⁸ In so far as the devolution of mahantship is concerned,

1. Mahant Ramji Dass v. Lachhu Dass (1902-3) 7 CWN 145, 148; Mayne's Hindu Law, op.cit., 10th ed., 941.

2. (1920-3) 7 CWN 145.

3. (1902-3) 7 CWN 145, 148.

4. Mukherjea, op.cit., 4th ed. 353.

5. ILR (1936) 63 Cal 326.

6. Ibid., p. 344.

7. Derrett, IMHL, 513.

8. Derrett, ibid., p. 513.

in circumstances where there is a failure of proving custom the rules of Justice, Equity and Good Conscience (J.E.G.C.) will apply.¹ In this context it may be remembered that though custom is the dominant rule relating to the succession of mahantship, it must not repeal the terms of the original foundation.² Moreover, the Courts need not resort to the doctrine of J.E.G.C. if in states, where the maths as public religious trusts are regulated by the state statutes and are required by law to be registered with State religious boards, and if in those states a new provision of law is introduced that each manager when registering his institution is to give information about the custom of appointing the mahant of his institution, because in that case it will be easier for the Court to verify the custom of appointing a mahant of each math controlled by a state statute and does not need the application of the doctrine.

SECTION 2

ADMINISTRATION OF MATHS

a. Introduction

Normally the mahant like the shebait of an idol is in possession and management of the math property,³ because he is not only the spiritual head but also the administrator of temporal affairs of the institution.⁴ In other words, he "combines in himself the dual office of being the religious or spiritual head of the particular cult or religious fraternity,

1. Derrett, IMHL, 513. See also Kali Pennamma v. St. Paul's Convent 1972 KLT 12, 18.

2. Derrett, ibid., p. 513.

3. Sarangadeva v. Ramaswami AIR 1966 SC 1603, 1606, see below, p. 371; Varadachari, op.cit., 134.

4. Mukherjea, op.cit., 4th ed., 365.

and of the manager of the secular properties of the institution of the math."¹ But the position may not be the same in circumstances where the endowment is made by a trust deed in which the mahant is neither a sole trustee nor a trustee even. In Arunachallam v. Ventakata-chalapati² where the head of the math brought the suit for the possession of a village forming part of the property of a math against the trustees who were in possession of the village, the Privy Council laid down that

"In the first place, the nature of the ownership is an ownership in trust for the institution itself. Secondly, while it may no doubt be true that the ownership in the general case is with the spiritual head of the institution, still, to use the language of Sir Charles Turner in Sammantha Pandara v. Sellappa Chetti³...

'We do not, of course, mean to lay it down that ... the property may not in some cases be held on different conditions and subject to different incidents.'"⁴

The aforementioned observation of Sir Charles Turner was quoted with approval in Ram Parkash Das v. Anand Das⁵ and referring to the management of a math property the Privy Council held that "It may ... rank as one of the varieties of circumstances and tenure whose adoption or rejection will fall to be determined by the usage and custom of the math."⁶

But in most of the cases the right of management of a math property belongs to the mahant only.

1. Per Sen, J. Krishna Singh v. Mathura Ahir AIR1980 SC 707, 713.

2. AIR 1919 PC 62 = 46 IA 204.

3. ILR (1879) 2 Mad 175, 179.

4. AIR 1919 PC 62, 68.

5. AIR 1916 PC 256.

6. Ibid., p. 258.

"The mahant is entitled to be installed and to be put into possession of all the math's property, which will remain distinct from the mahant's private property, though it is open to him₁ at any time to merge his private assets with the former."

It is a settled law that a mahant can possess private property.² When a mahant acquires property by his exertions or with his own money it does not lose "its secular character and partake of a religious character"³ as was held by the Privy Council in Parma Nand v. Nihal Chand,⁴ a case where though the head of the religious institution was called mahant the institution as such was not a math; it was called the Bagichi or the gurdwara. The main issue was whether the endowment was private or public and the Judicial Committee did "not think that any user or treatment of the property has been proved, such as would justify the conclusion that it was a public, and not a private trust."⁵

Now the law concerning the position of a mahant relating to his administration of the debutter or the math property seems nowhere to have been formulated so clearly and precisely as in Sarangadeva v. Ramaswami,⁶ a case where it was held by the Supreme Court that the title of the math to the suit lands was extinguished by adverse possession. Referring to Vidya Varuthi v. Balusami Ayyar⁷ and Commissioner, H.R.E. v. L.T. Swamiar⁸ Bachwat, J. pronounced for the Supreme Court that

"A mathadhipathi is the manager and custodian of the institution ... The office carries with the right to manage and possess the endowed properties on behalf of the math and the right to sue on its behalf for the protection of these properties. During the tenure of his office, the mathadhipathi has also large beneficial interests in the math properties..."⁹

1. Derrett, IMHL, 515.

2. Krishna Singh v. Mathura Ahir AIR 1980 SC 707, 719; Thakurji Maharaj Ram v. Kashi AIR 1980 NOC(All) 155; Math Sauna v. Kedar Nath AIR 1981 SC 1878, 1880, see above, p. 361.

3. Parma Nand v. Nihal Chand AIR 1938 PC 195, 196.

4. Ibid.

5. Per Sir Shadi Lal AIR 1938 PC 195, 198.

6. AIR 1966 SC 1603.

7. (1920-21) 48 IA 302.

8. AIR 1954 SC 282.

9. AIR 1966 SC 1603, 1606.

Again, though a math as a juristic entity¹ is the owner of the endowment and is capable of suing and being sued,² it, being an ideal person but physically incapable of doing anything, must act as a matter of necessity in relation to its temporal affairs through its human agency,³ the mahant. In Guranditta v. Amar Dass⁴ where the defendant contended inter alia that the suit land was secular but not debutter, Mudholkar, J. observed for the Supreme Court that

"a Mahant of an Akhara represents the Akhara and has both the right to institute a suit on its behalf as also the duty to defend one brought against it."⁵

But it was Sir Lawrence Jenkins, C.J. who stated the law in very clear terms when his Lordship pronounced in the Bombay High Court in Babaji Rao v. Laxmandas⁶ that

"this suit, brought for the recovery on behalf of the math of its property, has properly been so brought in the name of Laxmandas" [the mahant of the math in question], "not because the legal title is with him, but because he is the manager of the math, and so its appropriate representative for the purpose of any litigation necessary to enforce the rights of the math."⁷

b. Mahant's Power to Borrow Money or to Alienate Math Property

In so far as the administration of a math property is concerned the

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1. Vidya Varuthi v. Balusami Ayyar (1920-21) 48 IA 302, 311; Pushpagiri Mutt v. Ramalinga Sastri (1979) 1 MLJ 54, 55; Krishna Singh v. Mathura Ahir AIR 1980 SC 707, 726, see above p.362; Swami Harbansa Chari Ji v. State AIR 1981 MP 82, 87.
 2. Sarangadeva v. Ramaswami AIR 1966 SC 1603, 1606.
 3. Babaji Rao v. Laxmandas ILR (1904) 28 Bom 215, 223, see above, see also Sarangadeva v. Ramaswami AIR 1966 SC 1603, 1606 and Krishna Singh v. Mathura Ahir AIR 1980 SC 707, 726.
 4. AIR 1965 SC 1966.
 5. Ibid., p. 1969.
 6. ILR (1904) 28 Bom 215. The main issue was whether the suit by the mahant to recover the possession of the suit house was barred by limitation.
 7. ILR (1904) 28 Bom 215, 225.

power of a mahant to borrow money for the purposes of the math is similar to that of a shebait of a deity.¹ If there is security for borrowing money and if the creditor lends the amount after bona fide enquiries, a decree may be made making the amount recoverable from the endowed property in spite of the fact that no charge was created to that effect.² In this respect the decree can be issued even after the death of the mahant, for the succeeding mahants and the math will be bound by the decree.³ The principle in Prosunno Kumari Debya's case⁴ that the succeeding shebaits form a continuing representation of the debutter applies also in the case of the mahant's administration of the math property. In Kuber Sahib v. Phunnan Rai⁵ where the suit was brought by the mahant for the time being who alleged inter alia that the suit property had been transferred illegally by a former mahant and where the latter entered into a compromise with the transferee, the Allahabad High Court referred to Prosunno Kumari Debya v. Golab Chand Baboo⁶ and applying the said principle of the Privy Council case in the facts of the case observed that "This case" i.e., the Privy Council case, "governs the present case on all fours."⁷ It may be added here that a mahant's borrowing money by executing a promissory note will also bind the math, if the money so borrowed is spent for the necessary purposes of the math the law of which we have already discussed in detail in Section 4 of the fourth chapter when discussing the shebait's power of alienating debutter property.

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1. "The Mahant is on the whole as much a limited owner as a shebait, and can be called to account equally with him" - Derrett, IMHL, 516. See also Vardachari, op.cit., 135.
 2. B.K. Mukherjea, op.cit., 4th ed.
 3. "There is a perpetual succession amongst mahants. The acts of one will bind his successor, and decrees passed against him bind the math, exceptions are cases where alienations are made without necessity" - Derrett, IMHL, 515.
 4. (1874-75) 2 IA 145, 150.
 5. AIR 1935 All 255.
 6. (1874-75) 2 IA 145.
 7. Per Ganga Nath, J. AIR 1935 All 255, 256.

It may be interjected that in so far as the alienating power of the property in the hands of both the mahant and the shebait is concerned it is limited by the rules laid down in Prosunno Kumari Debiya's case,¹ which we have referred to extensively in section 4 of the fourth chapter, where we have dealt with the question of the power of a shebait to alienate a debutter property. There we have made out clearly that in relation to the alienation of the debutter or the math, the positions of the mahant and the shebait are both on the same footing. So in this section we will be laying stress on the points which are neither dealt with in detail nor touched upon in the said section of the previous chapter.

Now the points that the shebait and the mahant occupy exactly the same position in relation to the alienation of a debutter, and that Prosunno Kumari Debya² is applicable to both the alienations of the mahant and the shebait, are illustrated in Biram v. Narendra³ where the mahant sold practically an entire dharmashala at Hardwar. Ramaswami, J. pronounced for the Supreme Court

"In Prosunno Kumari Debya v. Golab Chand Baboo (1874-75) 2 Ind App. 145 (P.C.) it was observed by the Judicial Committee that notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is competent for a shebait to incur debts and borrow money for the service of the idol and preservation of its property to the extent to which there is an existing necessity for doing so, his power in that respect being analogous to that possessed by the manager of an infant heir."⁴

It may be pointed out that a math is often traditionally a going concern with financial interests which can be of advantage to society. A tendency to allow a mahant to take far-seeing steps regarding its investments would be understandable. We note with interest that the Courts are not always guided by the stringent test of legal necessity in a case relating to a mahant's borrowing money for the purposes of the math. They, on many

1. (1874-75) 2 IA 145.

2. Ibid.

3. AIR 1966 SC 1011.

4. AIR 1966 SC 1011, 1016.

occasions, approve a mahant's expenses for the purposes of the math on the short ground of 'prestige of the institution'. Thus in Niladri Sahu v. Mahant Chaturbhuji,¹ the mahant borrowed money to discharge previous loans for constructing a building to accommodate more visitors and in Vibhudapriya Thirtha Swamiar v. Lakshmindra Thirtha Swamiar² the mahant borrowed money for the expenses of a festival intending to carry on the prestigious expense of feeding a large number of Brahmins. These cases are plainly not examples illustrating preservation of the debutter. Feeding a large number of Brahmins as arose in Vibhuda Priya Thirtha Swamiar's case³ is certainly not connected with the preservation of the math property but it might well be related to the prestige of the math. It is on the ground of prestige that the expense of the mahant could be said to be upheld by the Privy Council as the valid one. The expense of constructing an extra building in Niladri Sahu's case⁴ related definitely to the question of the prestige of the institution, because the accommodation of visitors (in particular rich visitors) was not only the source of extra income for the math but also of the prestige of the institution in the sense that it could further the presence of the rich people in the institution. Moreover, in holding that the loans, obtained by the mahant by mortgaging the debutter properties to pay off his original loans, made not for the legal necessity, were valid, the Privy Council had in effect condoned the unauthorised loans of the mahant spent for the construction of the building. Truly unauthorised loans should, strictly speaking, bind not the math itself but the mahant personally, because in case of the original loans the lender did not enquire into the actual necessity⁵ of the construction of the

1. (1925-26) 53 IA 253.

2. (1926-27) 54 IA 228.

3. Ibid.

4. (1925-26) 53 IA 253.

5. The onus of proving that the debt is for necessary purposes of a math lies on the alienee. Thus in Murugesam Pillai v. Manichavasara Pandara AIR 1917 PC 6 = (1916-17) 44 IA 98 where the main issue to be determined by the Privy Council was whether the debt in question incurred by the mahant for the expense of litigations was a necessary expense

building, to find out whether they were made to avoid an impending peril to the institution itself, and are therefore unprotected. To discharge his personal liability of making unauthorised loans how could the mahant bind the math itself by mortgaging its properties, raising extra sums to discharge loans which were not spent for the necessary purposes of the institution? The Privy Council's decision that "the debt should be paid by the shebait personally"¹ is correct but the ruling that otherwise it should be "realized from the profits of the debutter property"² seems to be a very weak one.

It seems that a traditional viewpoint, viz. that preservation is the only allowable object, must be taken to be good law, until the Supreme Court or the legislature(s) provide otherwise.³ It is submitted that the Courts should ignore the oft quoted dictum in Niladri Sahu's case⁴ that it is "the immediate not the remote cause, the causa causans, of the borrowing which has to be considered".⁵ Instead they should concentrate on the issue whether a particular loan made by a mahant is connected with any cause, immediate or remote, relating to the preservation of the math property. The point of preservation and the benefit of the endowment should only be given due consideration, not the prestige of the institution. The prestige of an institution is certainly not so important as its survival.

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for the purpose of the math concerned. Lord Shaw, speaking for the Judicial Committee, observed that "The Board does not wish to cast any doubt upon the proposition that, in the case of mortgages granted over the security of an adhinam or math by the head thereof, it lies upon the mortgagee, or those in his right, to prove that the debt was a necessary expense of the institution itself" - at p.102 (1916-17) 44 IA 98.

1. (1925-26) 53 IA 253, 267.

2. Ibid., p. 267.

3. This view, however, should not be construed as altering my earlier opinion that social needs of the country come first and the nation's wealth tied up in religious endowments should be subject to taxation. See above, pp. 181-182.

4. (1925-26) 53 IA 253.

5. Ibid., p. 267.

The ground of prestige should not and cannot be grounds of necessity. Yet, the buying of even an elephant binding the math was accepted by the Court as an expense for the necessary purposes of the math. Thus in Sri Thakurji Ramji v. Mathura Prasad¹ the Patna High Court ignoring the correct argument of the plaintiff's counsel that "even assuming that an elephant was necessary, it was not such a necessity as would justify borrowing by a mahant on mortgage of the Asthal properties,"² held that "To a religious institution like a math its prestige and influence are of vital importance. Preservation of its prestige and influence are no less necessary than preservation of its property".³ But the law has never permitted alienation of a deity's property on the ground of prestige and the math as a juristic person should not be bound by any transaction of its mahant if it is made only for prestige and influence. It is not the prestige of the institution, but the individual prestige of the mahant which is concerned in such an expense, as approved in the Patna High Court case.

c. Debutter or Math property is not a Business

Now, as a general rule, a debutter or a math property is inalienable.⁴ But a mahant can create derivative tenures conformable to usage without legal necessity;⁵ but a permanent lease or absolute alienation of a math property without legal necessity is not within the powers of his management,⁶ but if the consideration for which a permanent lease is granted is not applied to the necessary purposes of the endowment, a point may arise whether the transaction can be upheld as a valid transaction for the necessary purposes of the endowment.

1. AIR 1941 Pat 354.

2. Ibid., p. 359.

3. Ibid., p. 359

4. Prosunno Kumari Debya v. Golab Chand Baboo (1874-75) 2 IA 145, 150.

5. Maharanee Shibessouree Debia v. Mothooranath Acharjo (1869-70) 13 MIA 270, 273; Mukherjea op.cit., 376.

6. Palaniappa Chetty v. Deivasikamony AIR 1917 PC, 33, 36; Srimath Ponnambala Desikar v. Periyanan Chetti (1935-36) 63 IA 261. C.J. Mutt, Tirupathi v. C.V. Purushotham AIR 1974 AP 175, 185.

Before we go into the details of the issue, I must point out that the law as it has stood for more than a century¹ is that the power of a manager of a debutter for the purpose of administration of the estate is analogous to the power of a manager of an infant's estate. The Courts have never countenanced the view that speculation with the debutter property could be made by the shebait. Debutter is not a business. This point was explicitly made by the Privy Council in Palaniappa Chetty v. Deivasikamony,² where the shebait of a temple situated in the district of Madura brought the suit challenging the transaction (granting of the kaul) of his predecessor. In that case the Judicial Committee observed inter alia that however "attractive and lucrative money-lending may be in India, it is needless to point out that a shebait would not be justified in selling debutter land solely for the purpose of getting capital to embark in the money-lending business".³ In so far as alienation of a debutter is concerned the Privy Council's ruling is a very important one. It is a disguised warning to managers of religious endowments that they are not dealing with properties as managers of profit-making businesses.

Again, any transaction of a mahant or a shebait to alienate debutter by mortgage, lease or sale must be of defensive character and it must be calculated to preserve the property from some threatened danger. In his management of the debutter a mahant's power to charge the debutter in case of danger or need is a limited power analogous to that of a manager of an infant's estate only. In Behari Lal v. Radha Ballabh Ji⁴ where the Allahabad High Court had to deal with the question of alienating a building by the shebait, Gurtu, J. pronounced for the Allahabad High Court that

"the test would be as to whether a person who as the guardian of a minor owning such property in similar circumstances would

1. After the decision in Prosunno Kumari Debya's case (1874-75) 2 IA 145.

2. (1916-17) 44 IA 147.

3. Per Lord Atkinson, 156.

4. AIR 1961 All 73.

as a prudent person have sold the property having regard to its structural condition and surrounding circumstances."¹

So the view² that the principle of 'the benefit of the estate' is not limited to transactions which are of defensive character in the case of a manager of a joint Hindu family is not applicable to a case of the mahant of a math or a shebait of the debutter. Yet the Court sometimes mixes up the role of a shebait or a mahant with that of a manager of a joint Hindu family and it applies the principles applicable to the case of a manager of a joint Hindu family to the case of a mahant or a shebait of a debutter.³ In Manikka Narasimhachari v. Ramsubbier⁴ the Madras High Court approved the alienation of a property belonging to a Hindu charitable trust on the basis of the principle governing an alienation of a manager of a joint Hindu family property. The principle applied on the facts of the Madras case was laid down by the Supreme Court in Balmukand v. Kamla Wati⁵, which is not at all related to an alienation of a shebait or of a mahant; on the contrary, it was concerned with the transaction of an eldest brother as the manager of a joint Hindu property. Moreover, the Supreme Court ruling that "for a transaction to be regarded as one which is of benefit to the family it need not necessarily be only of a defensive character"⁶ which is applied in the Madras case⁷, is based on the decisions

1. AIR 1961 All 73, 76.

2. Amraj Singh v. Shambhu Singh AIR 1932 All 632 (FB).

3. See Ramchandrajai Maharaj v. Lalji Singh AIR 1959 Pat 305, a case of religious endowment, where the High Court of Patna, it seems wrongly, applied the principles applicable to transactions of a manager of a joint Hindu family to the facts of the case where the shebait granted a perpetual lease of the debutter property. See specially p.311 where the Court ruled on the basis of the ruling in Jan Mohammad v. Bikoo Mahto, AIR 1929 Pat 130 that "The test in each case is whether it was a transaction into which a prudent owner could enter in the ordinary course of management in order to benefit the estate" - per Singh, J. See also Baidyanath Prasad v. Kunja Kumar AIR 1949 Pat. 75, 76.

4. (1970) 1 MLJ 337.

5. AIR 1964 SC 1385.

6. Ibid., p. 1387.

7. (1970) 1 MLJ 337, 341.

in Jagat Narain v. Mathura Das¹ and Sital Prasad v. Ajablal Mander² which had no connection with debutters but were related to transactions of managers of joint Hindu family properties. So, in so far as an alienation of debutter is concerned Manikka Narasimhachari's case³ is of doubtful authority.

An alienation of a joint Hindu family property by its manager and such an act by a mahant should not be placed on the same level. The law does not permit a shebait either to speculate like a businessman or to act prudentially like a manager of a joint Hindu family property with the sale proceeds of an alienated property. As long as the deity's property is not burdened with debts or its estate is not in danger of extinction no shebait is allowed to alienate any debutter and his activities, in this respect, must be limited by the decision in Prosunno Kumari Debya's case⁴

which indicates that they must be of a defensive character. The same will apply to maths.

Yet in Niladri Sahu v. Mahant Chaturbhuj⁵ the mahant was allowed to borrow on the security of the math properties to pay debts incurred earlier in order to enlarge facilities (by the construction of buildings for accommodation) for pilgrims (visitors), particularly rich ones, thereby making extra income for the math. In those circumstances the role of the mahant might not be inconsistent with the purposes of the institution,⁶ but he engaged

1. AIR 1928 All 454 (FB).

2. AIR 1939 Pat 371.

3. (1970) 1 MLJ 337.

4. (1874-75) 2 IA 145.

5. (1925-26) 53 IA 253.

6. "The defence of the math's property from litigation, protection against destruction or loss, and other defensive acts are obviously within his powers. He may also invest in projects which will plainly bring in a bigger income from offerings or otherwise consistently with the purposes of the math" - Derrett, IMHL, 516.

himself in speculative business¹ for the future income of the math which, it is submitted, was not consistent with the role of a manager of an infant's estate; on the contrary, the mahant played the part of a manager of a joint Hindu family which was never extended to mahants or shebait by the law laid down in Prosunno Kumari Debya's case.²

An alienation of property may be held valid for the purposes of a family business for making more profit, but that object does not apply to the alienation of an endowed property the main object of which is the fulfilment of spiritual desire. In Ram Nath v. Chiranjilal³ the deceased father of the defendants executed a mortgage deed to raise money inter alia to buy two shops. Singh, J. of the Allahabad High Court held that

"a manager of an ancestral joint family trading business has full authority to take loans and make alienations to raise money for the purpose of that business. Such a transaction will be binding on the entire family including the minor members. The creditor is not bound to enquire into the finances of the business so long as the business forms the purpose of the debt. All that is necessary for him to see is that the money is really required for the proper purpose of the business and there is no element of speculation or gambling in the transaction".⁴

So, in a secular property like joint family property or a joint family business the motive behind any alienation is the material prosperity of the family, and there is no scope for the fulfilment of any spiritual desire. "If the manager were confined to pure defensive acts, enterprise would be stifled and the family would stagnate."⁵

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1. To this effect the Privy Council (at p.261) pointed out that "the building project which the defendant" (the mahant) "promoted has been successfully effected by the use of a portion of the moneys borrowed by the defendant; that it has been completed in great part if not entirely; that it is functioning as contemplated by its author; that the math is to a great extent benefited by it, in that worshippers are more numerous and of a richer class, than theretofore visited the math for devotional purposes, attracted presumably by the increased and more civilized accommodation the new buildings afford."
 2. (1874-75) 2 IA 145.
 3. AIR 1935 All 221 (FB).
 4. AIR 1935 All 221 (FB), 232.
 5. Derrett, IMHL, 269.

In the case of an alienation of a joint family property the law must be taken as settled by the decision in Balmukand v. Kamla Wati.¹ Thus, relying on the Supreme Court case the Allahabad High Court held in Hari Singh v. Umrao Singh,² a case where the plaintiff brought the suit for specific performance relating to an agreement for sale entered into by the manager of a joint Hindu family, that a transaction of a manager to be regarded for the benefit to the family need not be of a defensive nature.³

But in so far as debutter is concerned an alienation of a shebait must be of defensive character. The dead hand feared in the West in renaissance times seems to figure in India. The Courts have never given the mahant or the shebait the powers of enterprise willingly acceded to the manager of a joint Hindu family property. A mahant's or a shebait's obligations are to see that the objects of the endowment materialise. A mahant's or a shebait's power to alienate a debutter is for defensive measures and must not be for purposes of material prosperity or aggrandisement.⁴ Moreover, the character of a debutter is different from that of a joint Hindu family property. This point is well dealt with in Medikenduri v. Venkatayya⁵ where a mother, as the guardian of her minor sons, instituted the suit against their father who as manager of the joint property sold an ancestral property (property of his adoptive mother) to buy some other lands. Holding the transaction of the manager as valid C. Reddy, J. said, in the judgement for the Madras High Court that

"there is a real distinction between an alienation by a manager of a joint Hindu family and an alienation by a 'shebait' of a temple. In my opinion, the powers of a manager of a joint Hindu family property are larger than those of a 'shebait' of a temple in this respect.

1. AIR 1964 SC 1385.

2. AIR 1979 All 65.

3. Ibid., p. 67.

4. Nagendra v. Rabindra AIR 1926 Cal 490, 501.

5. AIR 1953 Mad 210.

"In this connection, the dictum laid down by the Privy Council in Hunoomanpersaud Panday v. Mussamat Babooee Munraj Koonwaree¹ ... that

'The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance is a thing to be regarded'

does not countenance the contention that in order to validate a sale of ancestral land by the father the benefit should be purely of a defensive or protective character."²

It is submitted that this is an original judgement in the sense that it has explained clearly that a mahant's alienation of a math property cannot be guided by the same consideration as an alienation by a manager of a joint Hindu family property or an ancestral Hindu family property. For an ancestral family business and a debutter or math are not of the same character. A debutter is not a business and any alienation of that must be of defensive character. Where the Courts have, from time to time, found mahants engaging in a money-lending business, conflict between the facts on the ground and the law as consistently laid down by the Courts is noteworthy.

SECTION 3

(a) THE MAHANT'S POWERS OR RIGHTS and (b) HIS DUTIES

a. The Mahant's Powers or Rights

By discussing, in the above two sections, the various issues relating to the nature of a mahant, mahantship and the administration of math property we have already substantially dealt with the question of the mahant's powers or rights. One important aspect of mahantship, that is

1. (1856) 6 MIA 393.

2. AIR 1953 Mad 210, 212.

to say, the mahant's right of property, will be dealt with in detail below in section 5 of this chapter. So, in this sub-section, we will try to avoid repetition of developing those points which have been developed or will be developed in other sections.

We have already seen that the right to manage and possess the math property belongs to its mahant except in a case where the founder has directed otherwise.¹ In Sarangadeva v. Ramaswami² and Guranditta v. Amar Dass³ the Supreme Court applied the famous rule in Jagandindra Nath Roy's case⁴ that the right to use in respect of the debutter was vested with the shebait. But the point that the rule in the Privy Council case, as applicable to a shebait of an idol, is equally applicable to a mahant was made clear in Saragadeva v. Ramaswami.⁵ The Supreme Court in Guranditta's case⁶ did not refer to any case, not even to the Privy Council case. Yet, it made the rule that the mahant had the right to conduct suits on behalf of a math (Akshara) and the duty also to defend one instituted against it. The Court should have referred to the Privy Council case.

The point that the mahant has a large interest, larger than the shebait of an idol, in the debutter, enormous powers in the management of math property and ample discretion in applying the funds of the institution

1. Arunachallam v. Venkatachalapati AIR 1919 PC 62, 68.

2. AIR 1966 SC 1603.

3. AIR 1965 SC 1966.

4. (1903-4) 31 IA 203, 210; Supra sec. 2 3rd chapter, where the principles in the case have been discussed.

5. AIR 1966 SC 1603, 1606; see the previous section, p.384, where the principles in that case have been stated.

6. AIR 1965 SC 1966, 1969.

has been spelt out in different decisions of the Privy Council,¹ the Supreme Court² and the High Courts.³ It is the mahant's power of alienation of math properties which seems, in the final analysis, to be responsible for the introduction of statutes⁴ curbing powers and channeling the utilisation of math funds for proper purposes.

The mahant's powers in disposing of the income of the math are unlimited, because (amazingly) he is not bound to spend the income in a particular way.⁵ Again, if the mahant is left with any surplus income after spending the necessary expenses of the math, he can dispose of it in any way he likes. Thus in Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami⁶ the Madras High Court held that after meeting the expenses of the institution the surplus income is at the disposal of the mahant who can spend it at his discretion.⁷ It is very difficult to understand why the courts have never imported a resulting trust. The only explanation available is that custom consistently negates it. It must be pointed out here that the surplus income is the surplus amount belonging to the math and the income of the math is not limited to that of the original endowment only

An income of the institution arises also from offerings made by the

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1. For example, Vidya Varuthi v. Balusami Ayyar (1920-21) 48 IA 302, 311.
 2. For example, Commr., H.R.E. v. L.T. Swamiar AIR 1954 SC 282, 288.
 3. For example, Vidyapurna v. Vidyanidhi ILR (1904) 27 Mad. 435, 455; Lakshmi Narayan v. State AIR 1978 Pat 330, 331.
 4. Sec. 5 of this chapter deals with statutes controlling public trusts including maths.
 5. "Though it is objectionable that the math's income, or any of it, should be spent on purposes inconsistent with the math's functions ...", the mahant is not positively obliged by any rule of Hindu law to spend this way or that way - Derrett, IMHL, 516.
 6. ILR (1904) 27 Mad. 435.
 7. ILR (1904) 27 Mad 435, 455. See below, sec. 5, where the statement of Ayyangar, J. has been quoted, p.411. See also Derrett, IMHL, 516, where he summarises the law that "When as a result of good administration there arises a surplus income over and above the needs of the math and its usual functions, the mahant may apply it at its discretion".

followers.¹ The offerings² which are made to the mahant are of two types; one may be made for the purposes of the math and the other may be meant for the mahant for his personal use. The offerings made to the mahant for his use form the personal income of the mahant³ which he can spend in any way he likes. But both kinds of offerings are received by the mahant and when they are made for the purposes of the institution he receives them as a representative of the math.⁴ It appears that the law does not allow him an absolute discretion in distinguishing between the two classes of gifts. The offerings made to a mahant personally are generally his personal properties but in exceptional cases by custom they belong to the institution itself.⁵ In Commr., H.R.E. v. L.T. Swamiar⁶ Mukherjea, J. as he then was, observes on the point of offerings or gifts made personally to a mahant that

"Ordinarily a mahant has absolute power of disposal over such gifts, though if he dies without making any disposition, it is reckoned as the property of the math and goes to the succeeding mahant... It may be that according to custom prevailing in a particular institution, such personal gifts are regarded as gifts to the institution itself and the mahant receives them only as the representative of the institution: but the general rule is otherwise."⁷

So, there cannot be any doubt that as regards the offerings made to the mahant personally it is the general law that he is the absolute owner of them.

The mahant's large powers of disposal of the funds of the institution and his right to create derivative tenures or to make permanent alienation

1. See Vidyapurna v. Vidyanidhi ILR (1904) 27 Mad 435, 455.

2. See sec. 5 where an elaborate discussion on the subject will be offered.

3. Kumudban v. Tripura (1922) 35 CLJ 188, 190.

4. The mahant represents the math - see on this point Guranditta v. Amar Dass AIR 1965 SC 1966, 1969.

5. Varadachari, op.cit., 154.

6. AIR 1954 SC 282.

7. AIR 1954 SC 282, 293.

without any necessity¹ are the manifestations of his beneficial interest in the endowment or endowments attached to the institution. Though the Supreme Court in the Shirur Math case² did not point out the right of a mahant to alienate a debutter property permanently without any necessity until the end of his mahantship as a manifestation of his beneficial interest in the debutter, it must be stressed that this right like other rights also invests the mahantship with the character of proprietary right.

Because of the mahant's ample powers in dealing with the math property and its income, irregularities occur.³ To check him from abusing powers and to make use of the math funds for the proper purposes many State statutes for controlling maths publicly have been introduced.⁴ It is expected that in the near future alleged abuses⁵ by the mahant could be stopped to a great extent either through more legislation concerning problems of the math and mahantship, or through a development of the case-law such as would give guidance to mahants as to the more propitious use of their powers.

b. The Mahant's duties

Though "the mahant is the master of the property,"⁶ his primary duty as

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1. The mahant's permanent alienation without necessity is valid till the end of his tenure of office - see Srimath Daivasikhamani Ponnambala v. Periyanan Chetti (1935-36) 63 IA 261, 274. "A permanent lease of Mutt property granted by a Mohunt is not void altogether. It is operative at least during the tenure of office of the grantor." - Mukherjea, op cit, 4th ed., 377.
 2. AIR 1954 SC 282, 298. See above, sec. 1, p.363 where the famous statement of B.K. Mukherjea, J. on the conception of mahantship has been quoted.
 3. Derrett, IMHL, 517.
 4. Derrett, ibid., p. 517. For various statutes controlling public trusts including maths, see below sec. 5 of this chapter.
 5. Abuses of mahants are not limited to unauthorised alienations or spending of trust funds. There are cases where so-called mahants had been more enthusiastic in acquiring wealth by money-lending businesses than giving spiritual training. See Mahant Ganeshgir v. Fatechand (1934 31 Nag LR 282 and Gurcharan Prasad v. Krishnanand Giri (1969) 1 SCJ 180. The institutions involved in those two cases were so-called maths; in reality they were money-lending institutions but posing as maths - see Derrett, Critique, 235.
 6. Derrett, IMHL, 516.

the head of a spiritual fraternity is to give and encourage spiritual training.¹ The proprietary interest of the mahant in his office is "appurtenant to his duties".² It appears therefore that this is functional. In Commr., H.R.E. v. L.T. Swamiar,³ B.K. Mukherjea, J., as he then was, observed that

"A Mahant's duty is not simply to manage the temporalities of a Math. He is the head of a spiritual fraternity and the purpose of Math is to encourage and foster spiritual training by maintenance of a competent line of teachers who could impart religious instructions to disciples and followers of the Math and try to strengthen the doctrines of the particular school or order, of which they profess to be adherents."⁴

As a manager of the math the mahant is entitled to sue on behalf of the institution but it is his duty to "defend one brought against it".⁵

Now, though the mahant's power of alienation is primarily for the benefit of the math, i.e., for the preservation of the debutter, it can be interpreted as a duty imposed on the mahant as an administrator of the debutter to protect it even at the cost of alienating some portions of math property. The question whether he can go beyond this in the interests of the institution is still at large: an instance of potential growth in the case-law.

The mahant is not the trustee of the math property, yet he holds a fiduciary relation to the endowed property; he heads the institution as a religious preceptor and manages its property, having obligations to discharge in pursuance of the purposes of the institution for which it has been founded.⁶ In view of these obligations and duties attached to his office he is accountable as a trustee for any maladministration.⁷ As a manager

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1. Varadachari, op.cit., 2nd ed., 120. "The position of the Mahant is...quite different from that of a manager, dharmakarta or shebait of a temple. He is not a mere employee or subordinate in a math but its head whose duty (it) is to promote learning and further the interests of religion." (sic), Arora, op.cit., 235.
 2. Commr., H.R.E. v. L.T. Swamiar AIR 1954 SC 282, 289.
 3. Ibid. 4. Ibid., p. 289.
 5. Guranditta v. Amar Dass AIR 1965 SC 1966, 1969.
 6. Mukherjea, op.cit., 4th ed., 362.
 7. Vidya Varuthi v. Balusami Ayyar (1920-21) 48 IA 302, 311.

of a debutter he is to discharge the duties of a trustee as well.¹

Now, the head of a math is under a legal obligation to maintain his disciples out of the funds of the math but apart from custom a disciple is not entitled to maintenance.² "Here, however, as elsewhere, custom is the foundation of the law controlling the math, and there are no presumptions or analogies which ought to be applied until custom has been consulted."³

In Ramamohan Das v. Basudeb Dass⁴ where the plaintiff chela instituted the suit against the mahant for his maintenance out of the math funds, Jagannadhadas, J., observed for the Orissa High Court that

"While the head of the Muth is bound to maintain his disciples, and the proper maintenance of disciples is a legitimate expenditure of the muth property and its income, no specific right in favour of individual disciples or chelas can be recognised apart from usage."⁵

One would naturally assume that a teacher could dismiss a disciple at his option. The duties of a mahant are not appurtenant to his rights but the other way round.⁶ Duties are not subordinate to rights, "it is the rights that are subordinate and appurtenant to the duties..."⁷ The duties of a mahant should be considered as the substance of mahantship and his rights or powers should be regarded as an appurtenance of his duties.⁸

1. Commr., H.R.E. v. L.T. Swamiar AIR 1954 SC 282, 288.

2. Mukherjea, op.cit., 4th ed. 362.

3. Derrett, IMHL, 511.

4. AIR 1950 Ori. 28.

5. Ibid., p. 36.

6. Commr., H.R.E. v. L.T. Swamiar, AIR 1954 SC 282, 289.

7. Sundarambal v. Yogavanagurukkal AIR 1915 Mad 561, 564.

8. Nagendra v. Rabindra AIR 1926 Mad 490, 496, followed the Madras case (ibid.) on the point.

SECTION 4CONTROL OF MAHANTS AND SMARTHA VICĀRA

a. Control of Mahants

We have seen that in so far as the activities and the property of a math are concerned the mahant is all in all and as Derrett aptly points out "the mahant is the master of the property and may alienate for any purpose for so long as he remains incumbent. Otherwise what is authorised by law depends upon the circumstances".¹ It is true that in many of the Indian state statutes, which we will be discussing in the next section which, it may be pointed out, is complementary to this section, have been introduced to see that funds of maths are used for the purposes for which they were founded. Yet we find that in practice because of the position a mahant holds in the society, or in a sect, he is difficult to control and irregularities happen in spite of the fact that there are remedies open to the persons interested in a math. For "the difficulty was to take initiative effectively in the face of superstition, collusion and secrecy".²

In the states in which statutes have not yet been introduced to control mahant's irregularities or the existing statutes controlling maths as public trusts have not yet disturbed the provisions of sec. 92 of the Civil Procedure Code as amended in 1976 (which we have already discussed in sec. 4 of the previous chapter dealing with rights of worshippers to sue in the deity's name to protect the interest of the endowment), remedies against mismanaged maths are available to the persons interested in the maths under sec. 92 as it stands now.

In West Bengal and the Punjab where no state statute has yet been

1. Derrett, IMHL, 516.

2. Derrett, ibid., p. 517.

introduced to control any public trusts including maths,¹ worshippers and other persons interested in maths will naturally have no other statutory remedies other than provided in sec. 92 to protect the interests of the institutions, whereupon the traditional Hindu law will apply.

Now, in the case of a mismanaged math any two members of the sect interested in a particular math with the leave of the Court may institute a suit under sec. 92 of the Civil Procedure Code for the removal of the mahant, for rendition of accounts, for the appointment of a receiver and/or for framing a scheme, for the better administration of the math.²

Though the mahant is the master of the math property, though he can do virtually anything he likes with the math property, the ownership of any debutter over which he is the head, does not vest in him. So, if there is any maladministration of the debutter, involving the obligations and duties in his office, he is unanswerable as a trustee.³

A mahant can be removed for misappropriation of trust funds, complete failure to keep accounts of income and expenses of the institution, immorality, an act contrary to the tenets of the sect or against the usages of the math, but not for his inefficiency or improvidence.⁴ In Thiruvambala v. Manikkavachaka⁵ where the head of the math concerned purported to remove his junior Pandarasannadhi on grounds inter alia of

1. Maths are generally public institutions. The question whether there can be private maths is a controversial issue. The Supreme Court once expressed doubt regarding the existence of a private math (see Srinivas Das v. Surjanarayan AIR 1967 AP 256, 260). But the controversy seems to linger on for some time because of the contradictory decision of the Supreme Court itself affirming the existence of private maths in State of Bihar v. Biseshwar Das, AIR 1971 SC 2057, 2063, Mukherjea's 3rd ed. cited by the Supreme Court to support its decision. Varadachari does not think that trusts can be private, op.cit., 2nd ed. 118-119, but the "Report of the Hindu... Endowments Commission" accepts that there are private trusts, op.cit., 34.
2. Derrett, IMHL, 517-518.
3. Vidya Varuthi v. Balusami Ayyar (1920-21) 48 IA 302, 311
4. Derrett, IMHL 518; Mukherjea, op.cit., 4th ed. 384.
5. ILR (1917) 40 Mad 177.

a charge of immorality, Sheshagiri Ayyar, J. held that "if the head of the mutt or the junior is proved to be living an immoral life, he is liable to be removed".¹ What is 'immoral' is an open question. The Court may be bound to discover from evidence what the morality of the sect is in this regard.

In Satish Chandra v. Dharanidhar² where the finding of the Court was that the mahant of the shrine of Taraknath, situated near Calcutta, "rendered himself accountable for the various acts of malversation and breaches of trust committed in the course of his management"³, the Judicial Committee upheld the decision of the High Court which in turn accepted the view of the trial Court that the defendant, the mahant of the shrine, "was not a fit and proper person to continue as mahant, that he was removed from that office..."⁴ In short, the mahant of the shrine of Tarakeswar was removed in that case from his office for misappropriation of the math property.

In Tiruvengadath Ayyangar v. Srinivasa Thathachariar⁵ where the suit was brought to remove an office-holder of a devastanam committee, the appellant of the case who showed partiality towards a trustee of his own sect by sanctioning an expenditure of the temple funds for the liquidation of a fine inflicted on the trustee, the Madras High Court held that "mere error in judgement" is not "sufficient to disqualify an office holder in the position of the appellant".⁶ Similarly, in Annaji v. Narayan⁷ where the plaintiff brought the suit on the alleged grounds of mismanagement of the trust property, where the defendant Annaji, a hereditary trustee, was not aware of his legal position in relation to the trust concerned

1. ILR (1917) 40 Mad 177, 199.

2. (1939-40) 67 IA 32.

3. Ibid., p. 48.

4. Ibid., p. 33.

5. ILR (1899) 22 Mad 361.

6. Ibid., p. 364.

7. ILR (1897) 21 Bom 556.

and whose "idea was that he was entitled to manage the endowment free from control and very much as though he was its absolute owner"¹, the Bombay High Court, refusing to accept the contention of the plaintiff, held that

"it would ... be going too far to hold that a mistake by the defendant as to his true legal position ... should of necessity afford a ground for removing a hereditary trustee of such an institution as this from his post of manager and entrusting it to new hands".²

In the said case, the finding of the Bombay High Court was that the trustee manager was mistaken about his legal status in relation to the trust. But if a managing trustee, whether he is hereditary or not, claims the endowed property to be his personal estate, and uses its funds for his personal use, then the Court may rightly consider the circumstances to be sufficient for an order of the removal of the trustee. In Chintaman Bajaji v. Dhando Ganesh³ where the plaintiffs brought the suit for the removal of the managing hereditary trustees, the defendants, who claimed the endowed property as their own property, the Bombay High Court ruled that the assertion of the defendants' right to treat the trust property as their private estate was sufficient to justify their removal from the trust.⁴

It may be interjected here that the jurisdiction which the Court exercises in removing a mahant is a civil and not a penal jurisdiction which it uses as its duty to see that the execution of trusts is properly made.⁵ Whether there is a ground for the removal of a trustee, or whether a mahant should or should not be removed, is a matter "for the consideration of the Civil Court, which, must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will suit the requirements

1. ILR (1897) 21 Bom 556, 559.

2. Ibid., p. 559.

3. ILR (1891) 15 Bom 612.

4. Ibid., p. 623.

5. Mukherjea, op.cit., 4th ed. 384.

of the case".¹

A mahant can be removed from his office, to put it in a nutshell, for his gross misconduct,² generally by an appropriate proceeding; but there exist usages whereby a particular religious brotherhood is entitled to appoint the mahant and also to remove him for his misconduct.³

If a mahant, bound by the vow of celibacy marries, he may be removed.⁴ But the marriage of a mahant by itself is not a disqualification for being a mahant in all cases. In some Sudra maths a married person can be a mahant.⁵ Thus in Sathappryyar v. Periasami⁶ where the mahant was married the Madras High Court held that the mahant or "the pardesi for the time being may be either an ascetic or a married man".⁷

Now, like a lawful mahant, a de facto mahant is also subject to control and his alienations too cannot go without any question.⁸ In Mahadeo Prasad v. Karia Bharti⁹ where the math property was divided into two by a compromise deed creating two de facto mahants, the wrongful alienation of one de facto mahant was recovered by the other de facto mahant, the plaintiff.¹⁰ Again, a de facto mahant may be a right person to conduct suits in the interests of a math, while a lawful mahant might plead that he was improperly ousted by the de facto mahant.¹¹ In Vikrama Das v. Daulat Ram¹² where the de facto mahant brought the suit in the interests of the math and the first defendant was claiming that the Asthan property was his private property, the Supreme Court, holding the trust concerned to be a public one, ruled that,

1. Satish Chandra v. Dharanidhar (1939-40) 67 IA 32, 46, see above in this section, p.392.

2. Derrett, IMHL, 518

3. Mukherjea, op.cit. 4th ed. 385.

4. Tiruvambala v. Manikkavachaka ILR (1917) 40 Mad, 177, 199; Swami Harbansa Chariji v. State AIR 1981 MP 82, 89-90.

5. Mukherjea, op.cit. 4th ed. 385. 6. ILR (1891) 14 Mad 1.

7. Ibid., p. 11.

8. Derrett, IMHL, 518.

9. (1934-1935) 62 IA 47.

10. Ibid., p. 50.

11. Derrett, IMHL, 518.

12. AIR 1956 SC 382.

"Now the ordinary rule that persons without title and who are mere intruders cannot sue as of right is clear. But where public trusts are concerned, Courts have a duty to see that their interests and the interests of those for whose benefit they exist are safeguarded."¹

It may be pointed out here that extensive legislation has been introduced through the enactment of many State statutes,² subjecting maths and the mahant's alienating power to public control,³ but the legislation has not yet covered⁴ the whole of India, the notable exception being West Bengal;⁵ moreover, the existing Statutes do not cover all eventualities.

Thus there are still serious limitations in the Indian legal system in controlling mahants. In cases where the relief can be petitioned from the Court there is a paramount necessity not to defeat the trust. This point was long ago made clear by the Privy Council in Mohan Lalji v. Gordhan Lalji,⁶ a case where the plaintiffs brought the suit for the right to joint shebaitship of a temple. Referring to the rule⁷ laid down in Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee⁸ Mr. Ameer Ali pronounced for the Judicial Committee that

"This rule must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship."⁹

1. AIR 1956 SC 382, 390.

2. See next section where elaborate discussion on the statutes controlling public trusts has been offered.

3. See Derrett, IMHL, 517 where he cited, for example, statutes of Bombay, Madras and Orissa.

4. "Extensive legislation has been introduced to enable maths to be publicly controlled, as a result of which undoubtedly in many cases a greater proportion of math funds has been used for genuine charitable purposes. The statutes have perhaps not yet reached their final shape..." Derrett, IMHL

5. Varadachari, op.cit., 289.

6. (1912-13) 40 IA 97.

7. The rule referred to is that the shebaiti vests in the heirs of the founder.

8. (1888-89) 16 IA 137. See above, sec. 5 of the 4th chapter.

9. (1912-23) 40 IA 97, 103.

The Privy Council, in effect, laid down the law that the purposes of an endowment, not the shebait's interest, come first. This law has so far not been used creatively and that is why some states have developed the powers of the Commissioner of Hindu Religious Endowments to ensure that endowments are administered and incomes thereof appropriated properly.

Again, the in custodia legis situation is not adequate for any creative work at law. In Dhyan Singh v. Chandradip Sing,¹ the endowment concerned was a public religious endowment and it was neither in the possession of a shebait nor was it under any management committee for its proper administration. "The concurrent finding" was that "the properties belonged to a public religious endowment and neither the plaintiffs nor the defendants have any title to the properties nor any right to possess them."²

The negative powers of the Court, e.g. the removal of a mahant from his office, are well illustrated at Bhagwan Dass v. Jairam Dass,³ a case where it was held that the mahant^{could} be removed because of his asserting adverse title to and making unauthorised alienations of the endowed property. Again in Digiadarsan Rajendra Ramdassji Varu v. State⁴ the mahant was suspended from his office because of an enquiry concerning serious charges, e.g. immoral life and misappropriation, pending against him.

In this context, it must be urged that the Court certainly has ideas about what a religious trust is for. In Surendra Nath v. Dandiswami Jagannath Asram⁵ the main issue was in respect of the appointment of the mahant. Rejecting the judgement of the lower Court, the High Court of Calcutta ruled in effect that religious endowments were meant for the

1. (1969) 1 SCWR 242.

2. Ibid., p. 244.

3. AIR 1965 Punj. 260.

4. (1969) 2 SCWR 831.

5. AIR 1953 Cal 687.

faiths and beliefs of the worshippers. K.C. Das Gupta, J. pronounced that

"the Court should have respect for the faiths and beliefs of worshippers of such institutions and should not substitute its own ideas, however modern they may seem for those faiths and beliefs."¹

This is no doubt a realistic approach to the subject concerned.

Sometimes a particular statute may provide powers for the Commissioner to take positive steps in the case of the mismanagement of a trust. In S.D.G. Pandarasannadi v. State of Madras², though the Supreme Court judged the case under the Madras Hindu Religious and Charitable Endowments Act, 1951, it upheld the validity of sec. 45 of the Madras Hindu Religious and Charitable Endowments Act, 1959. Sec. 45 provides inter alia that the Commissioner may appoint an executive officer for the purpose of the administration of a trust. Referring to sec. 45 Subba Rao, J, as he then was, observed for the Supreme Court that

"Such a drastic provision may be necessary in a case where the temple is mismanaged or if there are other circumstances which compel such an appointment."³

On the other hand, a statute may compel a Commissioner or the like not to take any positive steps. His good notions may fall flat because of the provision of a particular statute. In Pureiromda Deity v. Chief Commissioner⁴ the Chairman of the Social Welfare Committee applied to the Manipur Administration for a piece of land belonging to a deity, for carrying on social welfare work, and the Chief Commissioner ordered

1. AIR 1953 Cal 687, 688.

2. (1966) 2 MLJ 1 (SC).

3. (1966) 2 MLJ 1 (SC), 6.

4. AIR 1960 Man 20.

that the said land be allotted for social welfare. The Judicial Commissioner held the order to be invalid because the Chief Commissioner did not follow the provisions of a statute, the Land Acquisition Act, 1894.¹

b. Smartha Vicāra

It is odd that the removal of a mahant is the only way one can attempt to ensure that the mahant's duties are performed! This can hardly be satisfactory. For if the mahant wins a Court case in spite of the fact that in reality he is dishonest, no power on earth can compel him to vacate his office. The Hindu Kings used to discharge their religious obligations towards their subjects in various ways including Smartha vicāra (Smartha enquiry). Brahmins versed in religious affairs were appointed to enquire into any complaint regarding a religious or caste matter. A Brahmin acquainted with Smṛti, i.e. a Smarthan, was to be included in such an enquiry. Any complaint against a mahant was looked into by a Smartha enquiry, and the mahant was kept under control; hence did not need to be removed to make sure his duties were performed. Thus the ancient kings, or even nineteenth century kings of Madras or Cochin, used to discharge their religious obligations through Smartha vicāra. In Vallabha v. Madusudanan,² the plaintiff was declared an outcast after the result of a Smartha enquiry³ into the charge of adultery against

1. "If the land is necessary for a public purpose by any Government then the provisions of the Land Acquisition Act, 1894 will apply and the Government have to follow the said provisions before taking over the said land". Ibid., p. 24.

2. ILR (1898) 12 Mad 495.

3. The local king appointed "a Smarthan (a Brahmin acquainted with Smṛti), four Mimamsakars (men versed in sifting evidence) and two others ... to aid in the investigation" - ILR (1889) 12 Mad 495, 497.

However, mimamsakars are scholars who can recognise a true injunction to determine its sense and significance--
Lingat, op.cit., 148-149.

the plaintiff.¹ The charge involved religious (caste) questions.

The persons involved in a Smartha enquiry are the counterparts of the officials of a present-day department of Hindu Religious Endowments but they, unlike the officials, were versed in religious affairs. Hindu kings protected the religious endowments through the ecclesiastical authorities and mahants were thus kept in control, without being removed. In present-day India Smartha enquiries may be reintroduced for investigating complaints against mahants.

Smarthans and other Hindu ecclesiastical authorities are the fittest persons to look into the affairs of maths and mahants because they are religious matters. Religious affairs should not be the concern of secular authorities in present-day India; they should be handed over to those persons versed in and concerned with religious matters.

1. See also Sirkar v. Narayanan Kesavan (1915) 5 Tra-Co LJ 311, a case where the plaintiff was excommunicated and forbidden to enter temples because of the finding of a Smartha vicara that he had committed adultery. The case followed the Madras Court case cited in the preceding footnote.

SECTION 5

STATUTES CONTROLLING PUBLIC TRUSTS AND THE MAHANT'S RIGHT OF PROPERTY

a. Statutes controlling Public Trusts

The point that there was jurisdiction of the ruling authority for controlling endowments before British rule was established in India has already been discussed above in Sec. 6 of the previous chapter. But the law, in a statute of the present type, for the purpose of controlling religious endowments does not seem to have been in existence before the British established their rule in the sub-continent. Ever since the acquisition of jaghir¹ by the East India Company in the Madras Presidency in 1640 the law concerning religious endowments in the presidency had begun to develop.² Prior to the introduction of Regulation 19 of 1810 in Bengal and Regulation 7 of 1817 in Madras in relation to public religious and charitable endowments,³ with the main object of promoting their trade and to consolidate their rule, the East India Company began to involve itself in the affairs of local religious institutions.⁴ The earliest function of the Company was the maintenance of law and order and to achieve this it used to intervene even in the religious disputes occurring among the local peoples. But the positive function of the company "was to give to the local people their laws and their institutions and to allow them to carry on their customs as freely as before".⁵

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1. It means an assignment by the state of a district and its revenue either to a body or to an individual with the power to administer it. See The Concise Oxford Dictionary, H.W. Fowler and F.G. Fowler (ed) 5th ed. Oxford University Press, Oxford, 1964, 649; it also means hereditary assignment and its rent as annuity. See C.Y. Mudaliar, op.cit., p.1 where he cited H. Yule and A.C. Burnell Hobson-Jobson, A Glossary of Anglo-Indian Colloquial Words and Phrases, London, 1903, 446.
 2. "The law and policy relating to the religious institutions within the territory of the East India Company had been shaping itself since the acquisition of jagir by the company in 1640"- Mudaliar, op.cit., 1.
 3. Mukherjea, op.cit., 4th ed., 456. 4. Mudaliar, op.cit., 2-3.
 5. Mudaliar, ibid., p. 3.

The Bengal Regulation 19 of 1810 and the Madras Regulation 7 of 1817 defined the jurisdiction within which the British Government was to exercise its sovereign rights in relation to religious and charitable endowments.¹ Like the said two Regulations there was also a Regulation in Bombay called Regulation 17 of 1827. But these regulations were not meant for the whole of India; they were confined to the Presidencies.²

In so far as they were concerned with purely religious endowments, the aforesaid regulations were repealed by the Religious Endowments Act, 1863 (Act 20 of 1863)³ which was applicable to public religious endowments only.⁴ The Act of 1863 transferred the power of the Board of Revenue to control religious endowments to non-official committees to be constituted under the provisions of the Act.⁵

Though the Charitable Endowments Act, 1890 (Act 6 of 1890), was a Central Act, it was introduced for the administration of public trusts for charitable purposes only.⁶ But the Charitable and Religious Trusts Act, 1920 (Act 4 of 1920) was introduced to be applied to both public charitable and religious trusts.⁷

The whole procedure of the Charitable and Religious Trusts Act, 1920 was of a summary character; no decision made on any point was final.⁸ But the main advantage of the Act was that the persons interested in a trust might gain material information of the trust by following the procedure laid down in the Act, and in the case of a trustee's refusal to divulge information a petitioner would be empowered to bring suit under sec. 92 of the Civil Procedure Code, which we have already referred to in the previous

1. Mukherjea, op.cit., 4th ed., 456.

2. Mukherjea, ibid., p. 457.

3. Mukherjea, ibid., p. 458.

4. Varadachari, op.cit., 2nd ed. 291.

5. Mukherjea, op.cit., 4th ed., 458.

6. Mukherjea, ibid., p. 463.

7. Mukherjea, ibid., p. 464.

8. Mukherjea, ibid., p. 465.

chapter, because the trustees' refusal to give information would be construed as a breach of trust within the meaning of sec. 92.¹

Again, in so far as the Religious Endowments Act is concerned, the only relief to be claimed under the Act is the removal of a trustee. There is neither provision for an appointment of a new trustee nor one for settling a scheme.² But in the case of a public religious endowment a petitioner can avail himself either of the provisions of the Act or of those of sec. 92 of the Civil Procedure Code. Sec. 92 unquestionably provides larger remedies to a petitioner applying in the interests of an endowment, because a suit brought under the section is a regular suit and unlike a suit under the Charitable and Religious Endowments Act, 1920, it is not to be tried summarily.³

Neither the Religious Endowments Act, 1863, the Charitable Endowments Act, 1890 and the Charitable and Religious Trusts Act, 1920 nor the remedies available under sec. 92 are exhaustive in relation to all problems of a public religious or a charitable endowment. Hence, most of the Indian states have introduced legislation dealing with public religious and charitable trusts⁴ and the primary object is "to ensure the efficient administration of Hindu religious endowments and to prevent the trustees of temples from misusing the funds of temples for their personal benefits."⁵

The following statutes⁶ dealing with public religious and charitable trusts have been enacted:-

i. The Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966 (Andhra Act 17 of 1966).

ii. The Bihar Hindu Religious Trusts Act, 1950 (Bihar Act 1 of 1951).

iii. The Bombay Public Trusts Act, 1950 (Bombay Act 29 of 1950).

1. Mukherjea, op.cit., 4th ed., 465. 2. Mukherjea, ibid., p. 467.

3. Mukherjea, ibid., p. 467.

4. Varadachari, op.cit. 2nd ed. 289.

5. K. Rajayogananda Murty, "Hereditary Archakas of Temples in Andhra Pradesh" (1965), 2 An. W.R. Jnl. 16-17, 17.

6. For the texts of the different state statutes see B.K. Mukherjea, op.cit., 4th ed., Appendixes 3-15, pp. 590-1069.

iv. The Madhya Pradesh Public Trusts Act, 1951 (Madhya Pradesh Act 30 of 1951).

v. The Madras Hindu Religious and Charitable Endowments Act, 1959 (Madras Act 22 of 1959).

vi. The Mysore Religious and Charitable Institutions Act, 1927.

vii. The Orissa Hindu Religious Endowments Act 1969 (Orissa Act 2 of 1970).

viii. The Rajasthan Public Trusts Act, 1959 (Rajasthan Act 42 of 1959).

ix. The Madras Hindu Religious and Charitable Endowments Act, 1951, is applicable to Kerala as amended,¹ for example, by the Kerala Act 41 of 1963, the Kerala Act 12 of 1968, and the Kerala Act 11 of 1981.

x. The Uttar Pradesh Hindu Public Religious Institutions (Prevention of Dissipation of Properties) Act, 1962 (Uttar Pradesh Act 22 of 1962).

In this context, the notable exceptions are the states of the Punjab and West Bengal which have not yet introduced statutes dealing with religious endowments.² The Acts in different states have been made with a view to making better provision for the administration of public trusts and the powers of supervision and control of those trusts have been vested in a board consisting of a Commissioner of endowments with a hierarchy of subordinate officials. The common objective of these statutes is to check any possible misuse by trustees of trust funds and to see that endowment funds are used for the purposes of the trust.³ Most of the statutes have

1. Varadachari, op.cit., 575.

2. Varadachari, ibid., p. 289.

3. "The desire for reform of Hindu religious endowments operates for the improvement of amenities of the temples, trying to make them more accessible to more people, to improve the standard of learning of their ministrants, to make the lives of their staffs more edifying, to turn idle endowment funds (where these still survive) to educational and charitable uses for the benefit of the Hindu community or for India at large. But this could not be achieved without a positive structure of administration and supervision, operating not merely by threats but by constructive advice, and co-operation with the temple authorities. It was not enough to leave the initiative in the hands of members of

provision for the compulsory registration of public trusts.¹ The trustees are bound by the Acts to keep regular accounts of the receipts and expenditure of the trusts and such accounts are subject to compulsory annual audit. For example, sec. 63 of the Bihar Hindu Religious Trusts Act, 1950 provides that the accounts of every religious endowment are to be audited every year by a qualified accountant acting as an auditor.² The duty of keeping the accounts of income and expenditure of an endowment does not lie on the managing trustee only; it is the duty of all trustees to get the accounts audited as required by state legislation.³ Thus in State v. Anil Kumar⁴ where the trustees did not get their accounts audited as required under sec. 33 of the Bombay Public Trusts Act, 1950, Divan, J. held for the Bombay High Court that,

"It is clear from sec. 32 that it is the duty of every trustee that the accounts are properly maintained. That duty cannot be shifted merely to the managing trustee and it is the duty of all the trustees in the light of Rule 17⁵ to see that the accounts maintained by them are audited as required by the Rules."⁶

Most of the statutes provide for settling schemes⁷ for the management of

(continued from previous page)

the public, who might be intimidated by the mahants or shebait and their associates in speculation; the power of inspection of accounts was given to a public official. At the same time that the legal machinery, to correct abuses and to enable misappropriated property to be recovered, was being made more efficient, new machinery was created in some states to enable the properties of endowments to be preserved, in certain circumstances, to be gathered in, and to be spent on worthwhile undertakings" - Derrett, "The Reform of Hindu Religious Endowments, op.cit., 328.

1. For example, sec. 18 of the Bombay Trusts Act, 1950 requires the trustee of a public trust to apply for the registration of the trust concerned. See Mukherjea, op.cit., 4th ed. 719. But the Madras and Orissa Acts are more meticulous about the registration of trusts. According to sec. 29 of the Madras Act and sec. 22 of the Orissa Act for every religious institution there must be a "prepared and maintained register" indicating inter alia the particulars of the endowment or endowments. See p. 639 and p. 912 respectively of Mukherjea's book, 4th ed.
2. For the text of the law see Mukherjea, op.cit., 4th ed., 613.
3. Varadachari, op.cit., 259.
4. AIR 1972 Guj. 125.
5. It means Rule 17 of the Bombay Public Trusts Rules, 1951, see Mukherjea, op. cit., 4th ed, 780-781.
6. AIR 1972 Guj. 125, 126.
7. For example, see sec. 93 of the Travancore-Cochin Hindu Religious Institutions Act, 1950 for the text Mukherjea, op.cit., 4th ed., 877.

endowed properties. But the Uttar Pradesh Act, 1962 has not provided sufficient provision for the administration of public trusts; it has omitted to provide the vital provision for settling a scheme.¹ Moreover, some state statutes for example the Bombay, Madras and Orissa Acts have curtailed the mahant's power of alienation in the sense that he cannot alienate a math property without the prior consent of the charity commissioner.²

The statutes enacted by the different states and the state administration pursuing the provisions seem to be doing well.³ The Report of the Hindu Religious Endowments Commission (1960-1962) points out that every state should have a statute dealing with Hindu religious endowments⁴ and this indicates that existing state statutes are working well in the field of religious endowments.

"Thus Public temples have been brought under active, if (one is told) not always perfectly efficient control, because the commissioners or their officers are in effect a layer of super-shebaits, whose sanction to proposed expenditure by the trustee is a valuable privilege, which exists surely, in order to be exercised with discretion..."⁵

Extensive legislation introduced by way of state statutes has no doubt

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1. "The Uttar Pradesh statutes are of very limited scope and reflect the tenderness of the public there to trustees of such endowments" - Derrett, RLSI 498. When Derrett says about "statutes" instead of a "statute" he may have in his mind both the Uttar Pradesh Act 22 of 1962 as mentioned above and the Uttar Pradesh Hindu Public Religious Institutions (Prevention of Dissipation of Properties) Rules, 1966.
 2. Derrett, IMHL, 517.
 3. "Extensive legislation has been introduced to enable maths to be publicly controlled, as a result of which undoubtedly in many cases a greater proportion of math funds has been used for genuine charitable purposes" - Derrett, IMHL, 517.
 4. P. 30; see also Derrett, RLSI, 498. At page 30 of the Report of the Hindu Religious Endowments Commission (1960-1962) op.cit., the Commission says that "It is in our view a matter of imperative necessity that suitable legislation should be undertaken by states having no legislation governing Hindu religious endowments, namely Assam, Punjab, West Bengal and U.P."
 5. Derrett, RLSI, 493, where the author also cites Rajayogananda Murty's article, op.cit., to point out that several officials were squeezed by the reforms of Hindu religious endowments.

resulted in a greater proportion of math funds being used for genuine religious or charitable purposes.¹ Mudaliar in her study² also pointed out in effect that the state supervision of public religious trusts through the implementation of the provisions of the Madras Hindu Religious and Endowments Act, 1959, in Madras has an overall good effect on the endowments themselves. It may be unquestionably accepted that the object of the Madras Act, 1959, was to seek the utilisation of the funds of Hindu public endowments for the purposes for which they were provided. The reform intended and made by the Act is beyond any objection. It does not seem to involve any political motivation as one can find in the Tamil Nadu Hindu Religious and Charitable Endowments (Amendment) Act, 1970³ in respect of which, when it was challenged by the archakas and the mahants in Seshammal v. Tami Nadu,⁴ the Supreme Court ruled, "the Amendment Act as a whole must be regarded as valid." The Amendment Act virtually abolished the hereditary priesthood and introduced a provision which would conceivably alter the language of religious worship from Sanskrit to Tamil. Pressler points out that the Supreme

"Court upheld the constitutionality of the 1970 archaka act, but did so in such a way as to render the act ineffective. While it confirmed that the Government could abolish heredity as a principle of priest appointment, it also confirmed that the state was bound not to violate the regulations laid down by the religious agamas. The agamas, in turn, declare that only persons following certain traditions and born of certain parents are competent to perform worship, and this obviously comes to much the same thing as heredity."⁵

1. Derrett, IMHL, 517.

2. See above, p. 33, footnote 4.

3. This Act was introduced in 1970 when the Dravida Munnetra Kazhagam (D.M.K.), a political party having traditionally an anti-Brahmin ideology, was in power in Madras. "The Government at this time was under the control of the Dravida Munnetra Kazhagam (D.M.K.), a political party which, historically, had exposed a distinctly anti-Brahmin ideology" - F.A. Presler, "The Legitimation of Religious Policy in Tamil Nadu (A Study of the 1970 Archaka Legislation)" in B.L. Smith (ed.) Religion and the Legitimation of Power in South Asia, Leiden, E.J. Brill, 1978, 106-133, 106.

4. (1972) 3 SCR 815.

5. Presler, op.cit., 131-132.

In this context, Derrett comments that

"The problem is how can India, a secular state, validly pass laws interfering with a hereditary priesthood and demote it to "temple-servant" status, and subsequently instruct managers of temples to have the rituals performed in Tamil, instead of Sanskrit?"

This is a sound and definitive view of the matter.

It is submitted that in any reform in the field of religious endowments, no political motive should be pursued against a particular section of the community. The Madras Amendment Act of 1970 was politically motivated and reveals a vindictive attitude of a particular political force in Madras against Brahmins of the state.

It is suggested that a central law should be introduced which will cover not only the religious endowments of Hindus but also those of every other community.² At least in one case, the Bombay Public Trusts Act, 1950, we might find a model for future central legislation covering public trusts belonging to all communities, but it must be stressed that any future legislation covering only public trusts will not do, it must be a comprehensive legislation covering private religious endowments as well, because from the standpoint of the nation's wealth and the amount of wealth involved, the regulation and control of private religious endowments are no less important than the regulation and control of public religious trusts. It will be observed that Muslim wakfs are subject to comparable statutory supervision (Wakfs Act, 1954),³ whether public or private in nature. Although there is no statute dealing with private Hindu religious endowments, there are settled views on so many aspects of the institution of the private Hindu religious endowment that it will not be difficult for Parliament to

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1. See the review by Derrett of Religion and the Legitimation of Power in South Asia, B.L.Smith (ed.) op.cit., where he appreciated very much the article of Presler, op.cit. and comments on it that "This is a first-rate appendix to C.Y. Mudaliyar's" book, op.cit. See Derrett's review in Orientalistische Literaturzeitung 76, Jahrgang 1981 Nr. 6, 593-594, 594.
 2. "Legislation in any case should be uniform for all communities and not be confined to Hindus" - Derrett, RLSI, 498.
 3. The Muslim Wakfs Act, 1954 (Act 29 of 1954).

sift out the settled principles either from the decisions of the Supreme Court and the Privy Council or from the different text books especially of Mukherjea, Varadachari and Ganapati Iyer. Above all, Parliamentarians wishing to do reform in this field may take into consideration the arguments and suggestions for reform in the field of Hindu religious endowments put forward by Derrett in his various works, particularly in the article "The Reform of Hindu Religious Endowments"¹ and text books, Religion, Law and the State in India² and A Critique of Modern Hindu Law.³ For Mukherjea, Iyer or Varadachari wrote : compilations of accepted legal principles, and in consequence very few suggestions for reform can be found there. With due respect to those learned writers their books represent the law for what it is, but for the law of what it should be one must listen to positive suggestions from other quarters, not ignoring aspects brought to light by an intensive study of wakfs.⁴

b. The Mahant's Right of Property

Like shebaiti, mahantship is a 'property'.⁵ Mahants "had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom or usage".⁶ A mahant's right to property was given the status of fundamental right by the Supreme Court in the "Shirur Mutt" case⁷ when B.K. Mukherjea, J as he then was, pronounced that

1. D.E. Smith (ed.), South Asian Politics and Religion, Princeton University Press, Princeton, New Jersey, 1966, 311-336.

2. Faber and Faber, London, 1968.

3. N.M. Tripathi, Bombay, 1970.

4. M.N. Hoque, "A Critique of the Law of Wakf in Bangladesh", thesis (unpublished), Ph.D. (London, 1982).

5. Commr. H.R.E. v. L.T. Swamiar AIR 1954 SC 282, 288.

6. Vidya Varuthi v. Balusami (1920-21) 48 IA 302, 311.

7. AIR 1954 SC 282. The view was affirmed in S.T. Swamiar v. Commr. H.R. & C.E., Madras, AIR 1963 SC 966, 971.

"There is no reason why the word 'property' as used in Art 19(1)(f) of the Constitution, should not be given a liberal and wider connotation and should not be extended to those well-recognised types of interest which have the insignia or characteristics of proprietary right. As said above the ingredients of both office and property of duties and personal interest are blended together in the rights of a Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office."¹

Art. 19(1)(f) (to the disgust of the Hindu Religious Endowments Commission) used to guarantee the fundamental right to property until the introduction of the Constitution (Forty-fourth Amendment) Act, 1978, which abolished that fundamental right.² To appreciate the catastrophic nature of this change we must remind ourselves of the ancient right of property. In S.T. Swamiar v. Commr. H.R. & C.E. Madras³ the Supreme Court emphasised the point of the large proprietary interest of the mahant in the debutter when it held that

"Mahant is not a mere manager or custodian nor is he a trustee in the strict sense holding the office of a mahant by custom and usage of the institution. He has, besides large powers of management and disposal, certain proprietary rights over the property of the math. But he is by virtue of his office under an obligation to discharge the duties as a trustee and is answerable as such".⁴

It was all too evident that the 'answerability' was feeble.

Again, the mahant has not only proprietary interests in his office and the endowed property but also he is the "master of the property and may alienate for any purpose for so long as he remains incumbent. Otherwise what is authorized by law depends upon the circumstances".⁵ It would be misleading to say that he is a mere manager of the math property as held in the leading case of Vidya Varuthi v. Balusami⁶ or that he "has to

1. AIR 1954 SC 282, 288.

2. For the text of the Act see Acts of Parliament, 1979, Ministry of Law, New Delhi, 1980, 197.

3. AIR 1963 SC 966.

4. AIR 1963 SC 966, 971.

5. Derrett, IMHL, 516.

6. (1920-21) 48 IA 302, 311.

discharge the duties of a trustee qua the institution and answerable as such".¹ He is neither a trustee nor a mere manager of the math property but on the contrary he is, by tradition and in the eye of the law a beneficiary of the property itself, as well as the manager of the entire debutter separate from his proprietary interest in his office as manager. So, it can actually be contended that:

"The law has made a hypocritical attempt to keep his interest within bounds, asserting that he is merely a trustee for the mutt. But it is perfectly notorious that he in fact represents the mutt, that he has entire disposal over its assets subject to general controls which in practice were of very little effect until the recent legislation, and that he has never been ousted from personal enjoyment from any presents made to him as mahant".²

Though the position of a mahant cannot be equated with that of a trustee, the property of the math is in some sense trust property; it is generally inalienable - which we have already mentioned above in sec. 2 of this chapter. In Sammantha Pandara v. Shellappa Chetti³ where the previous mahant contracted debts for the purposes of the math, Sir Charles Turner C.J. and Ayyar, J. explained the law in relation to the mahant's position. Their Lordships held that the property of a math

"is in fact attached to the office and possessed by inheritance to no one who does not fill the office."⁴ It is in a certain sense trust property, it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution".⁵

Again, in Commr. H.R.E. v. L.T. Swamiar⁶ B.K. Mukherjea, J., as he then was, observed that

1. S.T. Swamiar v. Commr. H.R. & C.E. AIR 1963 SC 966, 972.

2. Derrett, RISI, 490.

3. ILR (1879) 2 Mad 175, 179.

4. The same views were held in Krishna Singh v. Mathura AIR 1980 SC 707, 713.

5. ILR (1879) 2 Mad 175, 179.

6. AIR 1954 SC 282.

"under the law, as it stands, the Mahant has large powers of disposal over the surplus income and the only restriction is that he cannot spend anything out of it for his personal use unconnected with the dignity of his office".¹

This last is a suggestio falsi, as Derrett has pointed out that

"there is no rule of Hindu law which positively obliges the mahant to save or spend in a particular manner, or to be liable as if he were a technical trustee for unauthorized spending. He can sever surplus income from the pool constituted by the math's general income, and, although he cannot make it legally his own, he can dispose of it at his pleasure".²

For in Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami³ Ayyangar, J. pronounced for the Madras High Court that

"In the case of mutts defined and specific purposes, connected with the maintenance of the mutt as an institution, are, in the nature of things, very limited and a large part of the income derived from the endowments of the mutt as well as from the money offerings of its disciples and followers - which offerings as a rule are very considerable - is at the disposal of the head of the mutt for the time being, which he is expected to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion and he is in no way, whether as a trustee or otherwise, accountable for it in law".⁴

So, without being a legal owner of the debutter the mahant can enjoy the benefit of the math property practically as an owner thereof. The power of the sect to control him, once installed on the gaddi, is feeble at best.

Now, when the offerings are made to the mahant by a donor intending to advance the purposes of the institution, he, as the representative of the institution receives those offerings, the income of which belongs to the math itself. But the offerings made to him personally, but not for any purpose of the math, form the personal property of the mahant which he can dispose of in any way he wishes.⁵ To determine the intentions of the donor is often

1. AIR 1954 SC 282, 293.

2. IMHL, 516-517

3. ILR (1904) 27 Mad 435.

4. ILR (1904) 27 Mad 435, 455.

5. "When the offerings are made to the head of a mutt, not personally to him, but, for purposes appurtenant to it, they will be regarded as the property of the mutt and should be utilised for the purposes of the mutt. Where, however, they are made to the head of a mutt personally or individually, out of veneration for him, they belong to him and not to the mutt" - Varadachari, op.cit., 154.

difficult. These offerings are called either pranamis or padakanikais and generally belong to the mahant as his personal properties.¹ In Kumudban v. Tripura² where one of the questions to be settled was in effect the question whether offerings made to a mahant were his personal property, Sir Asutosh Mookerjee, A.C.J., referring to Girijanund v. Sailajanund³ observed for the Calcutta High Court that

"there is a fundamental distinction between the offerings made to the Deity and the offerings made to the mahant personally. If offerings are made to the Deity, they belong to the endowment and must be applied for the purpose of the endowment; on the other hand, if offerings are made by the faithful to the mahant personally,⁴ they do not become merged in the income of the endowment".

In support of his view Sir Asutosh pointed out inter alia the cases of Dhadphale v. Gurav⁵ and Kashi Chandra v. Kailash Chandra.⁶ Again, in the same judgement Sir Asutosh Mookerjee, A.C.J. laid down an important principle which was complementary to his above statement of law. He observed that

"whether a particular offering is made to the deity or the mahant personally depends upon the intention of the faithful devotee and no inflexible rule can be formulated, no general test can be prescribed, to determine whether on a particular occasion the offering has been made to the Deity or to the mahant personally."⁷

Now, returning to the question of a mahant in relation to the math property, it may be pointed out that the law which was laid down more than one hundred years ago in Sammantha Pandara v. Shellappa Chetti⁸ which we have discussed

1. Varadachari, op.cit., 154.

2. (1922) 35 CLJ 188.

3. ILR (1896) 23 Cal 645, a case where the suit was instituted against the high priest of the temple Baidyanath for the recovery of a certain amount and for a declaration that that amount could be realised by attachment of the surplus of offerings given to the deity concerned.

4. (1922) 35 CLJ 188, 190.

5. ILR (1881) 6 Bom 122. A very interesting case where the plaintiff as a temple servant brought the suit claiming damages against the defendant, because the latter as a worshipper did not make any offering of food to the deity for a year which he used to make every day.

6. ILR (1889) 26 Cal 356, a case relating to certain turn or pala of the deity and to a piece of land.

7. (1922) 35 CLJ, 188, 190.

8. ILR (1879) 2 Mad 175, 179.

8a. Regarding the Court's reluctance to interfere with the fundamental right to property in the case of matters, there was another method of supporting the state's action and defeating mahants' claims, and that is well illustrated in Jiban Chandra v. State of Assam, AIR 1966 Assam and Nagaland 51. On the validity of the Seventeenth Amendment, 1964, see V.N.Shukla, Const. of India, 6th edn., Lucknow, 1975, 149; Seervai, op.cit, vol.2, 1577; Golak Nath, AIR 1967 SC 1643, overruled in Kesavananda, AIR 1973 SC 1461, only prospectively overruled such Amendments).

above is still a firm law since it was reiterated by the Supreme Court in Krishna Singh v. Mathura Ahir¹ in 1980. In the Supreme Court case Sen, J. referred inter alia to Sammantha Pandara's case² and observed that

"The property belonging to a math is in fact attached to the office of the mahant,³ and passed by inheritance to no one who does not fill the office. The head of a math, as such, is not a trustee in the sense in which that term is generally understood, but in legal contemplation he has an estate for life in its permanent endowments and an absolute property in the income derived from the offerings of his followers, subject only to the burden of maintaining the institution. He is bound to spend a large part of the income derived from the offerings of his followers on charitable or religious objects. The words 'burden of maintaining the institution' must be understood to include the maintenance of the math, the support of its head and his disciples and the performance of religious and other charities in connection with it in accordance with usage".⁴

The word "offering"⁵ in the Supreme Court observation is meant offerings made to a mahant for the use of the math. Otherwise, the Supreme Court would not have spoken about "the burden of maintaining the institution"⁶ and on the basis of the Supreme Court proposition that a mahant "has an estate for life in its permanent endowments..."⁷ it may be pointed out that B.K. Mukherjea's statement that "a Mahant is neither a life tenant nor a corporation sole",⁸ it is submitted, is not true.

Now the Amendment of Art. 19(1)(f) by the Constitution Forty-fourth Amendment Act, 1978 has abolished the fundamental right of property for every citizen including mahants' or shebait's fundamental right of property in mahantship or shebaiti as formerly held by the Supreme Court in Commr. H.R.E. v. L.T. Swamiar⁹ when Mukherjea, J., as he then was, ruled that "the word 'property' as used in Art. 19(1)(f) should" be extended to

1. AIR 1980 SC 707.

2. IIR (1879) 2 Mad 175.

3. See Derrett, "The Concept of Property...", AIR 1968 Jm.2-8, cited above where (at page 5) he observes that "maths were given to mahants as their property with the tacit intention that it should descend to their disciples in each case, the senior or the best disciple being the next mahant seems quite certain. Many inscriptions signify that this must have been the case."

4. AIR 1980 SC 707, 713.

5. Ibid., p. 713.

6. Ibid., p. 713.

7. Ibid., p. 713.

8. Op.cit., 4th ed. 363. 8a.

9. AIR 1954 SC 282.

mahantship as well.¹ The Amendment Act has already prompted what were previously unthinkable reforms in the field of religious endowments.

Thus Kerala introduced the Payment of Rajabhogam to Thekkemadom Swamiyar Mathapram (Abolition) Act, 1980 (Kerala Act 15 of 1981).² According to sec. 3 of the Kerala Act, landholders of the endowed lands who used to pay assessment (Rajabhogam) to the mahant (the Thekkemadom Swamiar Mathapram at Trichur) will not have to pay the same any longer when the law comes into force, extinguishing the proprietary right of the mahant to receive Rajabhogam. The Kerala Statute is perfectly valid because it will not infringe any fundamental right of the Mahant of Trichur to receive assessment from the landholders of endowed lands. The Act would not have been valid but for the introduction of the Constitution Forty-fourth Amendment Act in 1979 which abolished fundamental right of property of every citizen along with the fundamental right of property involved in a mahantship.

The mahant's right of property in certain respects may be taken away by a valid state statute as we have seen in the case of the mahant of Trichur, but it will not be easy even for any Parliamentary statute to take away the right of a mahant to administer a math's property. For such a statute will not only infringe the fundamental right provided under Art. 26(d) of the Constitution, entitling a religious denomination to administer its own property, but also destroy the institution of mahantship itself. In the Shirur Math case³ the impugned Madras Hindu Religious and Charitable Endowments Act, 1951, entitled the Commissioner of Hindu Religious Endowments to take away the administration from a mahant in certain circumstances and the Supreme Court ruled it to be violative of Art. 26(d) of the Constitution⁴ and, holding that the interest of a mahant in mahantship

1. AIR 1954 SC 282, 291.

2. See Appendix IID for the text.

3. AIR 1954 SC 282. For critiques on the case see Derrett, RLSI, 494-497, and Mudaliar, op.cit., 178-182.

4. AIR 1954 SC 282, 291.

was a property within the meaning of Art. 19(1)(f),¹ also ruled that "To take away this beneficial interest and leave him merely to the discharge of his duties would be to destroy the character as a Mahant altogether".² No statute can substitute a Commission's discretion for the mahant's in the general management of the math.

Moreover, the alienating power of a mahant is an ingredient of his management of debutter and such a power cannot be taken away without amending the Constitution.³ No doubt his acts may be voidable or even void without the Commissioner's prior consent, but it is he who alienates, not the Commissioner. But if the mahant's power of alienating debutter were to be taken away then how could a mahant administer a math property, how could he save the debutter from any threatened danger or how could he play, as it were, the role of a manager of an infant's estate to protect a debutter? It seems that without changing the conception of mahantship it may not be possible to introduce satisfactory improvements in this field.

Though it may not be either possible or desirable to abolish the alienating power of a mahant altogether, this power of the mahant has been limited⁴ by the provisions of different state statutes such as Andhra Pradesh,⁵ Bombay,⁶ Madras⁷. In this context, it must be stressed that the limitation imposed on the powers of a mahant or a hereditary trustee in relation to endowed properties by a state statute has regularly been regarded

1. AIR 1954 SC 288.

2. Ibid., p. 282, 288, 289.

3. "Mahants" right of property in the mutt's assets comes to his aid, and his right to take the initiative in disposing of them cannot be taken away from except by amending the Constitution appropriately, or by abolishing his right of property by statute" - Derrett, RLSI, 493-494.

4. See on this point Derrett, IMHL, 517.

5. Sec. 74 of the Andhra Pradesh Charitable and Hindu Religious Endowments Act, 1966, see Mukherjea, op.cit., 4th ed., 1028.

6. See sec. 36 of the Bombay Public Trusts Act, 1950, Mukherjea, ibid., p. 729.

7. See sec. 34 of the Madras Hindu Religious and Charitable Endowments Act, 1959 where previous sanction of the Charity Commissioner is necessary in case of alienation. Mukherjea, ibid., p. 642.

as a reasonable limitation or restriction.¹ Thus in Commr. H.R. & C.E. v. S.T. Swamiar,² the Supreme Court upheld the provision of the impugned Madras Hindu Religious Endowments Act, 1951, as amended by the Madras Act of 1954, in sec. 52(1)(f) providing that an application of the funds of any religious institution for purposes not connected with those of the institution would be a ground for removal of the mahant. Shah, J. observed for the Court that

"By s. 52(1)(f) application of funds or properties for purposes unconnected with the institution i.e. purposes for which the custom of the institution does not warrant application is a ground for removal. It cannot be said that by enacting a provision which enables a Court, in an appropriate case, to remove a mahant, if it be found that he has applied the funds or the properties of the institution for purposes unconnected with the institution, any unreasonable restriction is sought to be placed".³

So, the power of Mahant's alienation of debutter for purposes other than the purposes of the math can be validly restricted by a statutory provision. But who is to establish which purposes are 'of the math', which customs apply, and what the mahant's discretion amounts to? The Commissioner is not given such judicial power (understandably), and the abuses are not tackled at source. Customary payments to a mahant may be abolished, but there is no power (and indeed no desire) to limit free will offerings by pilgrims or devotees of the sect, and these may be considerable.

SECTION 6

RECOMMENDATIONS

It is an undisputed fact that the institution of the math or any other

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1. Restrictions imposed by the Andhra Pradesh Charitable and Hindu Religions Institutions and Endowments Act, 1966, on hereditary trustees were held reasonable by the Supreme Court in K.A. Samajam v. Commr. H.R. & C.E. AIR 1971 SC 891, 897.
 2. AIR 1963 SC 966.
 3. Ibid., p. 972.

religious endowment stands for religious purposes¹ and that pious intentions should be carried out, but in the context of the present needs of India it may be pointed out that where any profit accrues to anybody, whether he is a mahant or a temple servant, he must account for it.

The religious activities of a math are guided by custom or usage, but the needs of the society come first. Therefore, activities involving expenses of an institution such as buying an elephant² or spending enormous amounts for any other alleged purpose of the math should not be held as necessary expenses for the institution in spite of the fact that those expenses might have been justified by an (antiquated) custom.

Mahants, in general, do not command the same respect³ from the members of their sects⁴ which their predecessors⁵ used to do. Modern India does not regard the mahants' and shebait's rights as sacrosanct. The fundamental right of property was abolished for all Indians; mahants and shebait's were

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1. The question of what is a religious purpose is considered in sec. 2 of the 2nd chapter, above. Saraswati Ammal v. Rajagopal Ammal AIR 1953 SC 491 is an important case on the subject. See above, pp. 99-100, 110-113. All purposes which are charitable under English law are also religious or charitable under Hindu law. But there are other purposes in addition which according to Hindu law are also valid as religious or charitable purposes. According to Hindu law acts of construction and maintenance of temples, tanks, gifts of food, places for drinking water, relief of the sick and promotion of education are religious or charitable purposes. These purposes are valid in the public's interests. See Ramchandra v. Shree Mahadeoji AIR 1970 SC 458, 464. See above, p. 99.
 2. See Sri Thakurji Ramji v. Mathura Prasad AIR 1941 Pat 354, supra, sec. 2 of this chapter.
 3. How can the public respect all mahants alike when some of them may act as drug-pedlars? See Mohant Kaushalya Das v. State of Madras AIR 1966 SC 22 where the hereditary mahant of a Bairaghi math in Madras acted as a drug (ganja) pedlar.
 4. "The public believes that mahants make good moneylenders and they perform a function parallel to that of banks (no doubt under the advantage of their immunities from revenue demands)" - Derrett, Critique, 386.
 5. They were sanyasis in the real sense and vedantic philosophers - see generally Mukherjea, op.cit., 4th ed., 324.

not excepted. In other words, the introduction of the Forty-fourth Amendment Act, 1978¹ dissiezed the mahants as well as other non-religious persons of their fundamental right of property.

We have seen that the mahant both as a religious leader and manager of the math not excluding any debutter therewithin, has ample powers in using the funds of the math. Because of the powers he can wield in the sect, he is very difficult to be brought to book. Again, old methods of control under the Civil Procedure Code are negative.² Under the provisions of section 92 to bring any suit either for the protection of the math or debutter or for the removal of the mahant, persons interested in an endowment are to await a wrong already done to the math or debutter. Moreover, by the time persons interested in the endowment can come to know about any wrongful alienation by the mahant, or can sue to protect the endowment, an alienee's title to the property might be perfected by the operation of the Law of Limitation! A vast amount of endowment funds has already gone into secular³ use and large sums will also go in future if in this field the law of limitation is not abolished.⁴ Though the new methods, i.e. the provisions of the State statutes, place the responsibility of taking care of the endowments on a public body⁵ and have been successful to a great extent

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1. For an effect of this amendment on the mahant's right of property see the Kerala Statute as discussed in the previous section.
 2. Derrett, "The Reform of Hindu...Endowments" cited above, 328.
 3. Derrett, ibid., p. 329.
 4. The Hindu Religious Endowments Commission also suggests (see the Report of the Hindu Religious Endowments Commission, op.cit., 182) that "there should be no limitation in respect of proceedings to recover or to follow up and obtain an account of the proceeds of the institution in the hands of alienees." This view has been incorporated in sec. 109 of the Madras Hindu Religious and Charitable Endowments Act, 1959. Derrett, ibid., p. 332.
 5. Derrett, ibid., p. 329.

in making use of trusts' funds for genuine charitable purposes, the different statutes themselves have not yet reached their final shape.¹

Now, we have already suggested in section 5 that a central law should be introduced covering endowments of different communities. There should not be so many hindrances in Parliament's way to introduce such a statute. The Commission of Hindu Religious Endowments very clearly held the view that "there is no insuperable difficulty or complication in enacting a uniform" legislation incorporating many provisions of the Religious Trusts Bill,² 1960, which provided inter alia that the trusts with the jurisdiction of the Commissioner must be properly administered and the income thereof duly used and applied to the purposes of such trusts.³

The aforesaid Commission pointed out that every religious institution should utilise its surplus money inter alia for liberal education in the ideals and faith which have found expression in such an institution.⁴ It also suggested that there should be a pool for the surpluses of different institutions which may be utilised in opening centres of institutions in different parts of India on the lines of the theological universities of the West. These suggestions seem to be impractical⁵ in the context of

Hindu society. Hindus are not Christians and mahants are not bishops. Moreover, temples and maths are not churches. Instead of utilising surpluses for religious degrees of the universities to be established on the analogy of the West they can be used of course for religious training in traditional Hindu schools or for any training to uplift the moral

1. Derrett, IMHL, 517.

2. For the text of the Bill see Appendix II E.

3. "The Report of the Hindu...Endowments Commission" cited above, 31. 4. Ibid.,^{p.74.}/

5. See Derrett's extensive comments on these suggestions at p. 332 of "The Reform of the Hindu Religious Endowments..." cited above, and at p.507 of his RLSI. His comments may be read as not favourable to the Commission's suggestions.

standard of a mahant, so that the respect of the public in the institution of the mahantship can be restored, or for temple or math repairs, purposes of the visitors or pilgrims, etc. But what about their use for the needs of all communities as a whole? If the act of dedication in every Hindu religious endowment, private or public, is for jagathitāya or for the benefit of the world,¹ then there should not be any objection from Hindu institutions in allowing their surpluses to be spent for all Indians alike, i.e. for the social needs of India.

The existing custom in relation to hereditary or other successions to the office of a mahant must be observed and no regularity can be imposed either on this or that math.² But if a math is used mainly as a money-lending institution the State may interfere and dissolve it,³ unless a scheme can be formed securing both the purposes of the sect and the maintenance of a going concern under the entrepreneurial leadership of a competent mahant. There must not be any place for any illusory religious institutions with an endowment attached to it which may exist only to evade the general law and where under cover of religion a so-called mahant or mahants foist things on the public in their nominal interest which are really at their expense. It is suggested that a statute may be introduced with the effect that illusory endowments made chiefly for secular purposes may be appropriated by the state.⁴ In the context of genuine religious endowments

1. Derrett, Critique, 377.

2. "Obviously the existing customs relating to hereditary and other successions to mahantship must be observed. The usual criterion of custom will serve well enough here. No regularity can be imposed upon this, any more than it can be imposed on mutts themselves" - Derrett, ibid., p. 385.

3. Derrett, ibid., p. 385.

4. If the mahant uses "a mutt...chiefly as a money-lending business the State can interfere and say, "Either occupy yourselves with religious matters or we shall dissolve you". This threat is to appropriate the property by statute, which is quite possible if the Supreme Court pursues its policy of not recognising as religious and (so protected by the Constitution) purely secular activities connected with a religious institution not essential for the religious purposes of that institution" - Derrett, ibid., pp. 385-6.

founded for carrying out pious intentions only, it may be said that if any profit accrues personally to individuals, mahants or shebaita whilst carrying out those intentions they must be taxed on it like other earners.

CHAPTER VII

CONCLUSIONS

The Constitution of India does not discourage, in any of its provisions, religious activities other than those associated with Untouchability, neither does it encourage any one religion in preference to others. Art. 25 of the Constitution provides freedom of religion to every individual but a proper examination of the article reveals that it does not give so much importance to the right to freedom of religion as to the two secular aspects of 'social welfare' and 'reform'.

But no reform is possible by the introduction of statutes alone, unless the Courts interpret statutes liberally, if necessary, reviewing the precedents faithfully but keeping the needs of the country in view. The needs of modern India come first. In the Hindu community the caste system is (as is generally agreed) an evil which must (in course of time) be abolished and in this respect the Courts must play a positive role, not ignoring those issues which are purely caste questions. The traditional view that the Courts will not interfere in any caste questions unless they are involved with property rights of individuals (cf. the construction of Civil Procedure Code, sec. 9 as amended) must be, if not actually abandoned, then most strictly construed, and the fundamental right given to castes to excommunicate at will any of their members, being irreconcilable with the needs of the society, must no longer be held unconditionally valid. Indeed the attempt to abolish excommunication in Bombay cannot be regarded as an utter failure,¹ and the Protection of Civil Rights Act (formerly the Untouchability (Offences) Act, 1955) as amended in 1976

1. See Sardar Syedna Taher Saifuddin Sahib v. State of Bombay AIR 1962 SC 853. See also Derrett's comments on the judgement of the Supreme Court, RLSI, 475-476.

entrenches upon it in sec. 7 (2).¹

Nevertheless the religious aspirations of the public and any section thereof are entitled to protection - including constructive and imaginative protection - from the Courts. The British administration, true to a long-lasting policy, tended to be supine and to let sleeping dogs lie.

Now the pre-British king was not so much concerned with the express intention of the founder of a religious endowment as with its use for worship by pious subjects. Even as late as the nineteenth century, the Hindu kings of Cochin and Madras used to perform their religious obligations through Smartha vicara (Smartha enquiry). As the Constitution of India is not anti-religious, it must accept some responsibility to protect and maintain Hindu religious endowments, not least Hindu private religious trusts which have not yet been the subject of any committee set up by any Central or State Government to divine the problems and suggest remedies therefor.

Many statutes are already serving as machinery for supervising and controlling Hindu public religious endowments in different provinces in India but not a single statute has yet been introduced in any state to control the evident malpractices and maladministration of managers of private Hindu religious endowments. The amount of what is, in effect, the Nation's wealth involved in private endowments is no less than that involved in public religious trusts; thus, urgent reform is needed in the field of private religious endowments.

In the states where private endowments are common a Government department should be set up to keep a record of all private endowments and to observe the way they work. Such an initiative has been taken

1. Subsection 2 of sec. 7 provides inter alia that any person denying to anyone of his community, any right or privilege to which that person is entitled, or who takes part in the excommunication of such a person arising from refusal to practise "untouchability" or pursuance of actions in furtherance of the objects of this Act, shall be punished with imprisonment or fine or both.

regarding Muslim wakfs. The duty of the State is to protect genuine Hindu private religious endowments, real debutters, but that does not mean it is obliged to protect nominal debutters or bogus dedications. Bogus dedications masquerading as Hindu private religious endowments must be discouraged as illusory trusts. They have no right to exist in any society under the mask of religion only to satisfy shebait's and their families' material needs. As long as a private religious endowment is used for religious purposes it is for universal benefit (jagat-hitaya) and so it can claim a place in Hindu society. It is gratifying to find that it can claim the protection of the Constitution which, by the Supreme Court's consistent interpretation, protects religion but neither superstition nor secular activities masquerading as religions.

Genuine religious endowments are to be protected by the State but that does not reflect in any way on the duty of every endowment to contribute, by paying taxes, to the needs of the Country. The deity may be a juristic person; it is established that he/she/it is not immune from income-tax! In the case of a private endowment only the surplus income after expenditure for the religious purposes of the endowment is assessable to tax and the same principle should surely be followed in the case of a public endowment.

However, with its vast population, India cannot afford to allow areas of land to be locked up as debutter free from rules against perpetuity. So, in the construction of wills the Courts should regularly incline against holding endowments as absolute debutter, because India needs mobility of capital and accessibility of land to fulfil its social purposes. The social needs of the Country must come first.

The present classification of temples into private and public is not satisfactory. The existing law does not make any distinction between a private temple founded for the spiritual welfare of the founder which allows members of the public to enter it for worship and a private temple

established by an individual or a family mainly to receive income out of the offerings of visitors who are allowed to enter it. One would welcome a reform of law to the effect that the mere fact that the members of the public are allowed to enter a temple will not characterise a temple as public but the fact of the public entering will change the character of the temple if it is used by a family or limited proprietors or impropriators to earn income out of public offerings.

So far as Hindu religious endowments are concerned, it is (no doubt) of the greatest importance to remember that the mahant or the shebait is not a bare trustee or a mere manager. The legal position of this functionary is sui generis; he is not a legal owner in the sense that he cannot alienate either debutter or a math property permanently without legal necessity but it is he who enjoys almost the same advantages as those of a full owner. An idol or a math can own legally but it itself cannot enjoy any profits of the property it owns. It is plainly absurd to pretend otherwise. In so far as a shebaiti is concerned, the remedy is not to abolish the institution but to bring in the account book. A remedy to prevent a shebait misusing debutter funds, especially those of a private endowment, must be worked out. Our study strongly suggests that a mere suit to remove him and to frame a 'scheme' is not adequate for the country's needs.

A shebait or a mahant is at present the effective beneficiary of a Hindu religious endowment. In the context of the shebait's ownership along with the deity in the debutter it may be suggested, in order to overcome the problems concerning shebaiti as property vis-a-vis the ownership of an idol as a juristic person, that the shebait or shebaits jointly own the assets subject to a trust which the Court must supervise when asked to do so by an interested person suing in the name of the idol and for its welfare. The same remedy would be suitable for a mahant or a manager of any Hindu religious endowment. This would amount to an admission that India knows

the distinction between legal and equitable estates which she has steadily refused to face since the introduction of English jurisprudence to India. Yet it may provide a solution.

For the effective administration of debutter the rule that all the co-shebait must join together to make any alienation of debutter property must be abandoned in favour of a new rule to the effect that, whether in a case of legal necessity or for the deity's benefit, when a managing shebait has the consent of the majority of competent shebait to make an alienation, he should be entitled to make it. The old law concerning a widow's right to adopt in Madras may be taken as a suitable analogy; according to that law the want of consent of some sapindas could be ignored.¹

It is suggested that if the benefit of the endowment or the necessity of the deity or the preservation of the debutter or math property is of paramount importance, and if the debutter can be alienated because of unavoidable circumstances by way of sale, mortgage, or permanent lease, then it is imperative that for the necessity of the deity or of a math there should be no bar to the shebait's or the mahant's alienating a portion of the endowed property to meet any legal necessity to borrow money, and to execute a promissory note if that is more reasonable. Yet this alone is not enough.

In so far as a Hindu religious endowment is concerned, a shebait's or a mahant's power of alienation exists at present for defensive measures. The view that the principle of 'the benefit of the estate' is not limited to transactions of a defensive character, as in the case of a manager of a joint Hindu family, cannot at present be applied to a case of a mahant of a math or a shebait of a debutter. Debutter or math property is not

1. T. Naidu v. K. Naidu AIR 1970 SC 1673, 1679; C. S. V. Sharma v. Ramalakshamma AIR 1972 AP 270, 273-274. On this point see above, sec. 7 of the 5th chapter.

regarded or accepted as a business. As long as the deity's property is not in danger of extinction a shebait is not yet allowed to alienate any debutter, and his transactions with the debutter must be of a defensive character. The same principle is in theory applied to maths. The shebait is not entitled to speculate as a businessman or even to act as a prudent manager of a joint Hindu family property with the sale proceeds of an alienated math or debutter property. A more imaginative and realistic definition of the incumbent's powers is called for in the public interest.

So far as the endowed properties belonging either to the deity or to maths are concerned, a law must be made to the effect that an acquirer of a debutter or a math property by adverse possession will not gain a valid title of ownership by the lapse of a certain period as provided in the Law of Limitation. The law must incorporate the ancient rule that God's property (or, we should say, charity assets) can never be acquired by lapse of time. Yet even this is, in our submission, not enough.

If a shebait does not discharge his duties properly he should be served with a writ analogous to mandamus to carry out the purposes of the endowment by which he is appointed. It is not sufficient that his powers should be widened: he should be compellable to use them. The law must emerge to the effect that the Court can be moved by a petitioner to make a delinquent shebait or shebaits of an endowment, private or public, perform their duty not merely of protecting the endowment against encroachment of any kind, but also of anticipating calamities and opportunities.

In so far as private religious endowments are concerned the present uncertainty regarding the question as to who can sue on behalf of the deity must be settled by an appropriate reform. The new rule should incorporate the principle that any person, whether a member of the family

or a stranger who has a continued interest in the family endowment, may be entitled to sue on behalf of the deity, in order to protect its interests without the prior permission of the Court. One is aware of the enormous delays attending litigation in territories where debutters are common. The Court should apply its mind less to the locus standi of an applicant than to the substance of the complaint.

Finally, as a relatively minor recommendation, it is suggested that the Court must widen its jurisdiction to entertain bequests such as bequests for dharma, general bequests to God or bequests for raising samādhis and making worship thereat. As these bequests are believed by some Hindus to have religious merit, they must be held valid. The Court's jurisdiction to decide what is not religion has, in our submission, been abused in the past.

Now, considering the extent of the Nation's wealth involved in religious endowments belonging not only to the Hindu community but also to non-Hindu communities, it is suggested that a comprehensive Central law should be introduced without delay to control and regulate them. An urgent treatment of the problems of endowments is needed to satisfy the social needs of the present State of India. The abolition of the former constitutional protection of the fundamental right of property has opened the door to comprehensive and imaginative reforms, which ought surely not be confined to one community.

APPENDIX I

YAJAMANA-VRITTI, SHISHYA-SANCHARAM AND OTHER RIGHTS RELATED TO PRIESTLY OFFICE.

The question whether yajamana-vritti (priestly occupation) or an analogous right e.g. shishya-sancharam (initiating shishyas (pupils)) is a right cognizable by a civil Court is a controversial issue.¹ Both the Madras and the Andhra High Courts are of the opinion that such rights are not legal rights which can be enforced in a civil Court. The High Court of Bombay is always consistent in holding the view that yajamana-vritti is a nibandha, being analogous to immovable property. But the rest of the High Courts do not seem to show consistency in their view on the point at issue.

Before we go into the details of the subject of yajamana-vritti it may be pointed out that the view held in different decisions² that the performance of spiritual duties is neither a right nor an office unless it is attached to an institution is now obsolete because of the provision in Explanation II of section 9 of the present Civil Procedure Code.³ According to the said Explanation a right to an office, in order to be enforced in a civil Court, need not necessarily be the right to an office attached to a particular place. So the view of the Andhra Pradesh High Court relating to the right to perform spiritual duties as held in

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1. See Derrett's Critique, Appendix I, 401 ff, where in the context of his critique of Tiruvenkatachariar's case, AIR 1969 AP 303 (FB), he elaborately discusses the subject in question and points out (at p.417) that "shishya-sancharam ... is heritable, and partible family property."
 2. Tholappala Charlu v. Venkata Charlu ILR (1896) 19 Mad 62, 64; Chunnu Datt Vyas v. Babu Nandan ILR (1910) 32 All 527, 539; Saripaka China Mahadeva v. M. Surjyaprakasam (1914) MWN 379, 380-381; Sri Bhashyam Konayamma v. Sri Bhashyam Ramaswami AIR 1928 Mad 851, 852; Tiruvenkatachariar v. Andalamma AIR 1969 AP 303 (FB), 314.
 3. For the text of section 9 see below, Appendix II B.

Tiruvenkatachariar v. Andalamma¹, which may be taken as the representative of the view expressed in various decisions of different High Courts that the performance of spiritual duties is not a legal right unless attached to an institution, is no longer valid. In that case the main issue was whether avocation of shishya-sancharam² was a justiciable right and Vaidya, J. spoke for the High Court that

"the performance of spiritual duties, even though it may be hereditary, is neither a right nor an office unless it is attached to a temple or an institution; nor is it property; and is not enforceable in any Civil Court."³

Reverting to the issue whether yajamana-vritti or an analogous right is a legal right, and the divergence of opinion held about it by the different High Courts in their various decisions, let us first discuss the cases in which the High Courts held such a right to be not a legal right. In Sri Bhashyam Konayamma v. Sri Bhashyam Ramaswami⁴ the widow of a guru claimed her share of offerings (shishyadayam) made by joint disciples of her late husband and his brother, and the Madras High Court held that a suit to recover a share of offerings made by disciples to their gurus could not be sued for in a civil Court when the existence of any office relating to voluntary offerings had not been established.⁵ This decision in effect laid down the law that shishya-sancharam was not a legal right.

In Sarwar Lal v. Ram Narayan⁶ the main issue to be decided by the Andhra Pradesh High Court was whether a right to priestly dues or voluntary offerings of yajamanas for performance of funeral rites or ceremonies was a legal right and the High Court held that Maha-brahmana-vritti was neither

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1. AIR 1969 AP 303 (FB).
 2. It consists "in visits to villages and initiating uninitiated members of the sect, giving instruction, and collecting offerings..." - Derrett, "Brit Jajmani and Cultural Continuity" (1972) ALJ Jnl., xlv-xlvi, xlv.
 3. AIR 1969 AP 303 (FB) 314.
 4. AIR 1928 Mad 851.
 5. Ibid., p. 852.
 6. AIR 1959 AP 307 = (1958) 2 An WR 433.

an office nor a civil right nor does it constitute property.¹ In Tiruvengkatachariar v. Andalamma² it was held that when gurus received presents from their disciples those earnings were their separate property and could not be partitioned, but, as in the instant case the earnings had been merged with the joint family property, the plaintiff who demanded partition was allowed her share of them. "The ultimate result, that she was entitled to a share, could not be objected to ... But the treatment of the institution known as shishya-sancharam is altogether unrealistic, though founded (to all appearances) upon the unexceptionable Anglo-Indian jurisprudence which was presented to the court with seeming elaboration."³ The Andhra Pradesh High Court analysed and cited cases on rights relating to yajamana-vritti, Maha-Brahmana-vritti, and analogous rights and came to the conclusion that shishya-sancharam is neither a heritable nor a partible property.⁴ In support of its conclusion the Full Bench referred inter alia to cases in which the point of determination was not the nature of the right to priestly dues but, rather, in those cases the main issue to be decided was the monopoly of the priests to give spiritual ministrations. One of the cases referred to by the Full Bench was Gour Moni Devi v. Chairman of Panihati Municipality⁵ where a Hindu Brahmin lady filed the suit to officiate at the cremation of all dead bodies brought to a burning ground and the main issue to be decided by the Calcutta High Court was the monopoly of the priests performing funeral rites. The case of Saripaka China Mahadeva v. Muthura Suryaprakasam⁶ where the plaintiffs claimed the purohitship of all villages in a zemindary was also concerned with the monopoly issue, as was the Calcutta case. Similarly the Full Bench decision of the Hyderabad

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1. AIR 1959 AP307, 309.
 2. AIR 1969 AP 303 (FB).
 3. Derrett, Critique, Appendix I, 402.
 4. AIR 1969 AP 303 (FB), 317.
 5. (1909-1910) 14 CWN 1057.
 6. AIR 1915 Mad 597 = (1914) 26 MLJ 482.

High Court in Gopal Rao v. War Nisi¹ was a judgement relating to the monopoly issue, i.e. the right of a purohit to perform religious duties to the exclusion of others. The said three cases have not much relevance to considerations of shishya-sancharam; nevertheless, it was pointed out in effect in the decisions of those cases that yajamana-vritti or other similar priestly rights were not of legal character. But the most relevant citation of the Full Bench of the Andhra Pradesh High Court was the case of Sri Bhashyam Konayamma v. Sri Bhashyam Ramaswami² in which it was held that a suit for a share of shishya-sancharam would not lie. On the other hand the Full Bench cited inter alia cases³ in which it was upheld that yajamana-vritti was a legal right constituting property. That yajamana-vritti is a legal right, nibandha, analogous to immovable property, is a consistent view held in the different decisions⁴ of the Bombay High Court which the Andhra Pradesh High Court refused to accept in its Full Bench decision. "Their long review of cases on the yajamana-vritti and closely analogous rights reveals that their lordships in Andhra Pradesh could not be persuaded that such relationships were equal to "property". To this one may object that what was claimed for shishya-sancharam was only analogous to yajamana-vritti, and that if it was adequately proved as a custom it deserved to be treated seriously in its own right and irrespective of the fluctuating and unsettled fates of similar or analogous institutions."⁵

Unlike the Madras and the Andhra Pradesh High Courts the Bombay High Court consistently held that yajamana-vritti was analogous to immovable property. In Krishnabhat v. Kapabhat⁶ where the plaintiff sued to

1. AIR 1953 Hyd 1 (FB).

2. AIR 1928 Mad 851.

3. For example Sarda Kunwar v. Gajanand AIR 1942 All 320; Gur Prasad v. Gur Prasad AIR 1944 Cugh 321.

4. For example, Krishnabhat v. Kapabhat ILR (1869) 6 BHCR 137; Balvantrav v. Purshotam Siddheswar ILR (1872) 9 BHCR 99 (FB).

5. Derrett, Critique, Appendix I, 405. 6. (1869) 6 BHCR 137.

establish his right to officiate as a priest and to share the proceeds of the ceremonies, Couch, C.J. observed for the Bombay High Court that though the office of a priest was "an incorporeal hereditament of a personal nature",¹ it was ranked with immovable property by Hindu custom.²

Likewise the Oudh High Court held in Gaya Din v. Gur Din,³ where the parties were Maha-brahmanas, that yajamana-vritti was immovable property. Following Sukh Lal v. Bishambhar⁴ the Court also held that Maha-brahmana-vritti was immovable and partible property.⁵

In Bhurthu v. Bhusan Prasad⁶ where the only point for determination was whether the priesthood belonging to the family in question was capable of being partitioned, the Nagpur High Court held that under Hindu law the hereditary priesthood was regarded as immovable and partible property.

In Ghisibai v. Mangilal⁷ where the suit was brought for a declaration regarding the share of income derived from the yajamana-vritti the Madhya Bharat High Court discussed the distinction between Mana-vritti and yajamana-vritti and held that in the case of Mana-vritti the relation between a yajamana and the priest (purohit) was casual and as such Mana-vritti was a casual property, but yajamana-vritti created a permanent relation, and was regarded as a heritable property.⁸

The Allahabad High Court in its many decisions held that yajamana-vritti was a heritable property.⁹ In Sarda Kunwar v. Gajanand,¹⁰ a case where the dispute was concerned with rights in respect of yajamana-vritti or Brit Jajmani of Gangaputras or Hindu priests who ministered to pilgrims visiting pilgrimage sites on the banks of the Ganges, receiving offerings from them, Das, J. observed for the High Court of Allahabad that "Birt Jajmani right is a heritable property and in some cases transferable...."¹¹

1. (1869) 6 BHCR 137, 139.

2. Ibid., p. 139.

3. AIR 1929 Oudh 257.

4. ILR (1917) 39 All 196.

5. AIR 1929 Oudh 257, 262.

6. AIR 1954 Nag 307.

7. AIR 1953 Madh. Bha 7.

8. Ibid., p. 8.

9. Sukh Lal v. Bishambhar AIR 1917 All 115=ILR(1917)39 All 196; Ram Chandar v. Chhabbu Lal AIR 1923 All 350; Sarda Kunwar v. Gajanand AIR 1942 All 320; Sidhe Nath v. Prem Club AIR 1972 All 324 which is discussed in detail below.

10. AIR 1942 All 320.

11. Ibid., p. 322.

In Raghoo Pandey v. Kassy Parey¹ where the suit was filed for redemption of certain shares of a right to officiate as priest at funeral ceremonies the Calcutta High Court held that the right in question was in the nature of immovable property. The same High Court in Narayan Lal v. Chunhan Lal² held that presents made by pilgrims were presumed to be the personal property of the priest but the members of the family might agree amongst themselves that whatever anyone of them might earn as officiating as a priest was to be kept in a common fund and divided among them in certain proportions; "thus the books containing the pilgrims' names, etc., are partible property."³ It is submitted that the said common fund to be divided in certain proportions was in reality the partible joint-family property.

In Sidhe Nath v. Prem Club⁴ the defendant club intended to promote healthy sports including swimming on the bank of the Ganges at Kanpur, and at the same place some Gangaputras practised as religious preceptors to pilgrims by performing certain religious ceremonies at the edge of the Ganges. The reliefs claimed by the Gangaputras were, inter alia, to restrain the club from interfering with their exercise of Brit Jajmani rights over the land in dispute. But the lessee, the Prem Club, took the land clear of any right due to the action of the Uttar Pradesh Government under the Land Acquisition Act, 1894. But in the present context what is of relevance in the judgement is the fact that obiter Mr. Justice Shukla considered the nature of the right to be as claimed by the Gangaputras.

In determining the right of the Gangaputras the High Court of Allahabad gave careful consideration to the arguments relating to the distinction between Brit Jajmani and Man Brit rights, and held that so long as the Gangaputras maintained more than casual contact with their yajamanas

1. ILR (1884) 10 Cal 73.

2. (1912) 15 CLJ 376.

3. Derrett, Critique, Appendix I, 411.

4. AIR 1972 All 324.

(pilgrims) they had a Brit Jajmani right which was heritable and alienable property. The Court held the right of the Gangaputras as Brit Jajmani right.¹ It showed the difference between Brit Jajmani and Man Brit, and to this effect cited with approval Sarda Kunwar v. Gajanand² and Ghisibai v. Mangilal,³ in which cases it was held that in the case of Man Brit the relationship between a yajamana and purohit was of casual nature whereas Brit Jajmani or yajamana-vritti created a permanent relationship between yajamanas and a purohit which was a heritable and partible right. The Court pointed out that Man Brit was not a right to be enforced legally but it held that

"it is well established that the right of Brit Jajmani is a right in the property. It is heritable and in some cases even transferable and therefore legally enforceable."⁴

Now the view of the Andhra Pradesh and the Madras High Courts regarding the nature of the rights involved in yajamana-vritti and shishya-sancharam, as reflected in the decision in Tiruvenkatachariar's case,⁵ that such rights are not legal rights, is no longer true because of the decision of the Supreme Court in Ram Rattan v. Bajrang Lal⁶ on the question whether the hereditary office of a shebait was immovable. This point we have already discussed in section 4 of the fourth chapter where we have seen that the Supreme Court answered the question in the affirmative, i.e. the hereditary office of a shebait was an immovable property. But what is of interest in the Supreme Court decision is that in deciding the said issue the Court cited with approval inter alia the cases⁷ where yajamana-vritti was held

1. "In sum, a truly Indian institution was received happily into Indian law. Whether the right could be founded on agreement (with an unidentified number of people!), a lost grant (by an unidentified sovereign!), usage (again as between unidentified and even unidentifiable groups), or custom (with unenforceable conditions!) did not matter" - Derrett, "Brit Jajmani and Cultural Continuity", op.cit., xlvi.

2. AIR 1942 All 320.

3. AIR 1953 Madh Bha 7.

4. AIR 1972 All 324, 327.

5. AIR 1969 AP 303 (FB).

6. AIR 1978 SC 1393, 1397.

7. Ibid., p. 1396.

to be immovable property. It accepted the view of the nature of the right involved in yajamana-vritti as expressed in Krishnabhat v. Kapabhat¹ and Balvantrav v. Purshotam² that such a right was a legal right constituting property. The Supreme Court first accepted that yajamana-vritti was immovable property and then concluded that as an analogous right to yajamana-vritti shebaiti was also immovable. So if yajamana-vritti is accepted by the Supreme Court as a right constituting property then no one will argue that shishya-sancharam is not an analogous right to yajamana-vritti; the Andhra Pradesh High Court cited and discussed the cases on yajamana-vritti extensively only to arrive at its decision that shishya-sancharam was not a legal right. The Court would not cite those cases if it was in doubt that they were relevant to the determination of the issue of shishya-sancharam. But the decision of the Court is obsolete. Following the Supreme Court decision it can be said that yajamana-vritti along with shishya-sancharam are legal rights constituting property, and, like shebaiti, they are heritable and partible.

1. (1869) 6 BHCR 137.

2. (1872) 9 BHCR 99 (FB).

APPENDIX IISTATUTES AND BILLS

A. The Limitation Act, 1963 (Act 36 of 1963)

PART VIII.-SUITS RELATING TO TRUSTS AND TRUST PROPERTY

Description of suits	Period of Limitation	Time from which period begins to run
92 To recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
93 To recover possession of movable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.
94 To set aside a transfer of immovable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
95 To set aside a transfer of movable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.

Description of suits	Period of Limitation	Time from which period begins to run
96 By the manager of a Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years	The date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment, whichever is later.

B. The Civil Procedure Code as amended by the Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976).

9. Courts to try all civil suits unless barred

The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation I - A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Explanation II - For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.

92. Public charities

(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained leave of the Court, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local

Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree -

- a) removing any trustee;
- b) appointing a new trustee;
- c) vesting any property in trustee;
- d) directing accounts and inquiries;
- e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust;
- f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;
- g) settling a scheme; or
- h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

(3) The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied cy pres in one or more of the following circumstances, namely:-

- (a) where the original purposes of the trust, in whole or in part,-
 - (i) have been, as far as may be fulfilled; or
 - (ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust; or
- (b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or
- (c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or
- (d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or

(e) where the original purposes, in whole or in part, have, since they were laid down,-

- (i) been adequately provided for by other means, or
- (ii) ceased, as being useless or harmful to the community, or
- (iii) ceased to be, in law, charitable, or
- (iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.

C. The Guruvayoor Devaswom Act, 1978 (Kerala Act 14 of 1978)

Chapter II

THE COMMITTEE

3. Incorporation.-(1) The administration, control and management of the Devaswom shall be vested in a Committee constituted in the manner hereinafter provided.

(2) The Committee shall by the name of "the Guruvayoor Devaswom Managing Committee" be a body corporate and shall have perpetual succession and a common seal and shall by the said name sue and be sued through the Administrator.

4. Composition of Committee.-(1) The Committee shall consist of the following members, namely:-

- (a) the Zamotin Raja;
- (b) the Karanavan for the time being of the Mallisseri Illom at Guruvayoor;
- (c) the Thanthri of the Temple, ex-officio;
- (d) a representative of the employers of the Devaswom nominated by the Hindus among the Council of Ministers;
- (e) not more than five persons, of whom one shall be a member of a Scheduled Caste, nominated by the Hindus among the Council of Ministers from among persons having interest in the Temple.

(2) A person shall be disqualified from being nominated under clause (e) of sub-section (1), if-

- (i) he believes in the practice of untouchability or does not profess the Hindu Religion or believe in temple worship; or
- (ii) he is an employee under the Government or the Devaswom; or
- (iii) he is below thirty years of age; or
- (iv) he is engaged in any subsisting contract with the Devaswom; or

(v) he is subject to any of the disqualifications mentioned in clauses (a), (b) and (c) of sub-section (3) of S 5.

(3) The members of the Committee shall, at its first meeting, elect one of its members as its Chairman.

(4) Every member of the Committee shall, before entering upon his office, make and subscribe in the presence of the Commissioner an oath in the following form, that is to say-

"I, A B, do swear in the name of God that I profess the Hindu Religion and believe in temple worship and that I do not believe in the practice of untouchability".

5. Term of office of non-official members, resignation and removal of such members and casual vacancies in their office.- (1) A member nominated under clause (d) or clause (e) of sub-section (1) of S. 4 shall hold office for a period of two years from the date of his nomination and shall be eligible for renomination.

D. The Payment of Rajabhogam to Thekkemadom Swamiyar Mathapram (Abolition) Act, 1980 (Kerala Act 15 of 1981)

An Act to provide for the extinguishment of the right of the Thekkemadom Swamiyar Mathapram to receive, and the liability of the landholders to pay, Rajabhogam, and for matters connected therewith.

Preamble:- WHEREAS it is necessary in the public interest to provide for the extinguishment of the right of the Thekkemadom Swamiyar Mathapram to receive, and the liability of the landholders to pay, Rajabhogam, and for matters connected therewith;

BE it enacted in the Thirty-first Year of the Republic of India as follows:-

1. Short title and commencement - (1) This Act may be called the Payment of Rajabhogam to Thekkemadom Swamiyar Mathapram (Abolition) Act, 1980.

(2) It shall come into force on such date as the Government may, by notification in the Gazette, appoint.

2. Definitions:- In this Act, unless the context otherwise requires:-

(a) "appointed day" means the day on which this Act comes into force;

(b) "landholder" means a person holding any sanketham lands and liable to pay Rajabhogam to the Mathapram;

(c) "Mathapram" means the Thekkemadom Swamiyar Mathapram at Trichur;

(d) "Rajabhogam" means the assessment on the sanketham lands, payable to the Thekkemadom Swamiyar Mathapram, whether called Muppara or Ettilonnu;

(e) "Sanketham lands" means the lands in the Manickamangalam village in the Alwaye Taluk of Ernakulam District, in respect of which Rajabhogam is payable to the Mathapram.

3. Abolition of Rajabhogam:- Notwithstanding any^{thing} contained in any law for the time being in force, or in any judgment, decree or order of any court, or in any contract or other document with effect on and from the appointed day, -

(a) the right of the Mathapram to receive Rajabhogam shall stand extinguished; and

(b) the landholder shall have no liability to pay Rajabhogam to the Mathapram.

4. No compensation be payable,- Notwithstanding anything contained in any law for the time being in force, or in any contract or other document, no compensation shall be payable to the Mathapram for the extinguishment under S. 3 of the right of the Mathapram to receive Rajabhogam from the landholders.

5. Arrears of Rajabhogam,- Notwithstanding anything to the contrary contained in this Act, all arrears of Rajabhogam which accrued due before the appointed day or on behalf of the Mathapram in the same manner as they recoverable immediately before the appointed day.

6. Power to make rules,- (1) The Government may, by notification in the Gazette, make rules to carry out the purposes of this Act.

(2) Every rule made under this section shall be laid, as soon as may be, after it is made, before the Legislative Assembly while it is in session for a total period of fourteen days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, the Legislative Assembly makes any modification in the rule or decides that the rule should not be made, the rule shall thereafter have effect only

in such modified form or by of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

E. The Religious Trusts Bill, 1960¹

Chapter I

Preliminary

CLAUSES

1. Short title, extent and commencement.
2. Definitions.

Chapter II

The Commissioner and Other Authorities

3. Appointment of Commissioner and other authorities.
4. Advisory Board

Chapter III

Powers and Duties of the Commissioner

5. General powers and duties of Commissioner.
6. Application for registration of religious trusts.
7. Inquiries for registration.
8. Entries in register.
9. Amendment of register.
10. Special provision for religious trusts registered under any other enactment.
11. Budgets of religious trusts.
12. Maintenance of accounts.
13. Investment of trust money.
14. Audit of accounts.
15. Inspection and returns.
16. Alienation of immovable property.
17. Power to determine the object to which trust-property shall be applied where the object has ceased to exist or is incapable of achievement.
18. Power of Commissioner to settle schemes for proper administration of religious trusts.

1. In the light of our present investigation, it is submitted that even if this Bill goes to the Statute Book in its present form it would not solve the problems raised in this thesis. See the conclusions and recommendations at pages 418-428

19. Power of Commissioner when trusts are managed.
20. Power to remove trustees in certain other circumstances.
21. Power to appoint trustee when vacancy occurs.

Chapter IV

Miscellaneous

22. Procedure and powers at inquiries under the Act.
23. Appeals.
24. Trustee to carry out orders of Commissioner and execution of such orders.
25. Offences and penalties.
26. Contributions.
27. Furnishing of copies of extracts from register.
28. Finality of orders.
29. Jurisdiction of civil courts barred in respect of certain matters.
30. Notice of certain suits to be given to the Commissioner.
31. Protection of action taken in good faith.
32. Commissioner, etc., to be public servants.
33. Power to give directions.
34. Act not to apply to certain classes of trusts.
35. Power to exempt.
36. Power to make rules.
37. Repeal.

The Religious Trusts Bill, 1960

(As introduced in Lok Sabha)

A

BILL

to provide for the better supervision and administration
of certain religious trusts.

Be it enacted by Parliament in the Eleventh Year of the Republic of
India as follows:-

CHAPTER I

Preliminary

1. Short title, extent and commencement.— (1) This may be called the
Religious Trusts Act, 1960.

(2) It extends to the whole of India except the State of Jammu and
Kashmir.

(3) It shall come into force in a State on such date as the State Government may, by notification in the Official Gazette, appoint.

2. Definitions.- In this Act, unless the context otherwise requires,-

(a) "Commissioner" means the Commissioner of Religious Trusts appointed under sub-section (1) of section 3 and includes a Deputy Commissioner or an assistant Commissioner appointed under sub-section (2) of that section;

(b) "manager", in relation to a religious trust, means a person who, either alone or in association with any other person, administers or deals with the trust-property;

(c) "person interested", in relation to a religious trust, means -

(i) any person who has a right to worship or to perform any rite, or to attend at the performance of any worship or rite in any religious institution connected with such trust, or to participate in any religious or charitable ministration made under such trust,

(ii) the founder or any descendant of the founder of such trust, and

(iii) the trustee;

(d) "prescribed" means prescribed by rules made under this Act;

(e) "religious trust" means any express or constructive trust existing or created for public purposes of a religious nature, whether associated with purposes of a charitable nature or not, but does not include a private endowment for religious purposes in which the public are not interested;

(f) "trustee" means a person in whom either alone or in association with any other person the trust-property is vested, and includes a manager;

(g) "trust-property" means any movable or immovable property forming the subject matter of a religious trust.

CHAPTER II

The Commissioner and Other Authorities

3. Appointment of Commissioner and other authorities.- (1) The State Government may, by notification in the Official Gazette, appoint a person to be the Commissioner of Religious Trusts for the State for exercising the powers conferred, and performing the duties imposed, on him by or under this Act.

(2) The State Government may also, by like notification, appoint as many deputy Commissioners or assistant Commissioners as it thinks fit, and every such deputy Commissioner or assistant Commissioner shall, subject to

the general superintendence and control of the Commissioner, perform his functions within such local limits as may be specified in the notification; and in the discharge of these functions, a deputy Commissioner or an assistant Commissioner shall have and shall exercise the same powers as the Commissioner.

(3) A person shall not be qualified for appointment as the Commissioner under sub-section (1) unless he is, or has been, a district judge or is qualified for appointment as a Judge of a High Court.

4. Advisory Board.— (1) The State Government may, by notification in the Official Gazette, constitute an Advisory Board consisting of such number of members, not exceeding ten, as it thinks fit, to advise the State Government in relation to the administration of religious trusts.

(2) The members of the Advisory Board shall be chosen from amongst one or more of the following categories of persons, namely:—

(a) members of the State Legislature and members of Parliament representing the State;

(b) persons connected with religious activities in the State;

(c) persons connected with social, charitable or educational activities in the State; and

(d) persons having special knowledge of administration, finance or law.

(3) The Commissioner shall be an ex officio member of the Advisory Board.

(4) The State Government shall nominate a member of the Advisory Board to be the Chairman thereof.

(5) The number of persons to be appointed as members from each of the categories specified in sub-section (2), the functions of, the procedure to be followed in the discharge of their functions by, the term of office of, and the manner of filling casual vacancies among, the members of the Advisory Board shall be such as may be prescribed.

CHAPTER III

Powers and Duties of the Commissioner

5. General powers and duties of Commissioner.— (1) Subject to the provisions of this Act, the Commissioner may do all such things as may be reasonable and necessary to ensure that all religious trusts within his jurisdiction are properly administered and that the income thereof is duly appropriated and applied to the objects of such trusts and in accordance with the purposes for which such trusts were founded or for which they exist, so far as the objects

and purposes can be ascertained.

(2) Without prejudice to the generality of the provisions of subsection (1), the powers and duties of the Commissioner shall be -

(a) to maintain a record containing full information relating to the origin, nature, extent, income and objects of all religious trusts in the State;

(b) to ensure that the accounts of religious trusts are properly maintained and audited;

(c) to ensure that the income from every trust property is properly applied to the objects of the religious trust and the surplus is invested in accordance with the provisions of this Act;

(d) to give directions, wherever necessary, for the proper administration of any religious trust in accordance with the law governing such trust and the wishes of the founder, in so far as such wishes can be ascertained;

(e) to settle schemes of management for religious trusts in accordance with the provisions of this Act;

(f) to perform the functions imposed on the Commissioner by or under this Act;

(g) generally do all such acts as may be necessary for the proper supervision and better administration of religious trusts.

6. Application for registration of religious trusts.-(1) It shall be the duty of the trustee of every religious trust to make an application to the Commissioner for the registration of the trust.

(2) Such application shall be made in writing, in such form and manner, and accompanied by such fee, as may be prescribed and shall, as far as may be, contain the following particulars, namely:-

(a) the designation by which the religious trust is or shall be known or the name of the trust;

(b) the names and addresses of the trustees and the manager;

(c) the mode of succession to the office of the trustee;

(d) the movable and immovable properties forming the subject matter of the trust and a description thereof sufficient for their identification;

(e) the approximate value of the movable and immovable trust-property;

(f) the gross annual income from such property;

(g) an estimate of the expenses annually incurred in connection

with such religious trust;

(h) such other particulars as may be prescribed.

(3) Every application shall be accompanied by a copy of the trust deed or, if no such deed has been executed or a copy thereof cannot be obtained, the application shall contain full particulars, as far as they are known to the applicant, of the origin, nature and object of the trust.

(4) Every application under this section shall be signed and verified by the applicant in the manner provided in the Code of Civil Procedure, 1908, for the signing and verification of pleadings.

(5) The Commissioner may require the applicant to supply such further particulars or information relating to the trust as the Commissioner may consider necessary.

(6) Every application for registration shall be made -

(a) in the case of a religious trust existing at the commencement of this Act, within six months from such commencement; and

(b) in the case of a religious trust created after such commencement, within six months from the date of the creation of the trust.

7. Inquiries for registration.-(1) On receipt of an application under section 6, the Commissioner shall, in the prescribed manner, make such inquiries as he thinks fit in respect of the application and the correctness of the particulars therein and may, in particular, make an inquiry in respect of all or any of the following matters, namely:-

(a) whether there is a trust and whether such trust is a religious trust;

(b) whether any property is the property of such trust;

(c) whether the whole or any substantial portion of the trust-property is situated within his jurisdiction;

(d) the names and addresses of the trustees and the manager;

(e) the mode of succession to the office of the trustee;

(f) the origin, nature and object of such trust;

(g) the gross average annual income and expenditure of the trust;

(h) any other matter which may be prescribed.

(2) If, on an application made to him by a person interested in a religious trust or otherwise, the Commissioner has reasons to believe that there is any religious trust which should be registered under this Act, he may make such inquiries as he thinks fit in respect of the matters mentioned in sub-section (1), but no such inquiry shall be made without giving the trustees an opportunity of being heard.

(3) On the completion of an inquiry under this section, the Commissioner

shall record his findings with reasons therefor in respect of the matters mentioned in sub-section (1), and make an order in relation to the religious trust.

8. Entries in register.- (1) The Commissioner shall maintain a register of religious trusts in such form and containing such particulars as may be prescribed.

(2) When an order for the registration of a religious trust is made under section 7, the Commissioner shall cause entries in respect thereof to be made in the register in accordance with the findings recorded under that section.

9. Amendment of register.- (1) Where any change occurs in any of the entries recorded in the register maintained under section 8, the trustee shall, within ninety days from the date of the occurrence of such change, send a report to the Commissioner in the prescribed form giving notice of the change.

(2) On receipt of a report under sub-section (1) or otherwise, the Commissioner may hold an inquiry for ascertaining whether any change has occurred in any of the entries recorded in the register in relation to a religious trust.

(3) If the Commissioner, after holding such an inquiry, is satisfied that a change has occurred in any of the entries recorded in the register in relation to a religious trust, he may make an order to that effect and shall cause entries in the register in respect of that trust to be amended accordingly.

10. Special provision for religious trusts registered under any other enactment.- (1) Where any religious trust has been registered in a State before the commencement of this Act under any other enactment relating to trusts in force in that State, the religious trust shall be deemed to have been registered under this Act as from such commencement.

(2) The Commissioner shall issue a notice to the trustee of such a religious trust for the purpose of recording entries relating thereto in the register maintained under section 8 and the Commissioner may, after making such inquiry as he thinks fit, record his findings with reasons therefor in respect of the matters mentioned in sub-section (1) of section 7 and make an order in relation to the trust and the provisions of sections 7 and 8 shall, as far as may be, apply to such order.

11. Budgets of religious trusts.- (1) The trustee of every religious trust shall prepare every year, in such form and within such time as may be prescribed, a budget of the estimated income and expenditure of such

trust for the next financial year and shall forthwith send a copy thereof to the Commissioner:

Provided that nothing in this sub-section shall apply to a religious trust having an annual income of less than five thousand rupees.

(2) The Commissioner may, after giving notice to the trustee in the prescribed manner and after considering his representation, if any, make such alterations or modifications in the budget as the Commissioner thinks fit.

(3) Nothing contained in sub-section (2) shall be deemed to authorise the Commissioner to restrict or prohibit the observance of any religious practice or the performance of any act in pursuance of any religious belief to alter or modify any budget in a manner or to an extent inconsistent with the wishes of the founder of the trust so far as such wishes can be ascertained or with the provisions of this Act.

12. Maintenance of accounts.— (1) The trustee of every religious trust shall keep regular accounts in such form and containing such particulars as may be prescribed.

(2) The accounts kept under sub-section (1) shall be balanced each year on the 31st day of March or such other day as may be fixed by the Commissioner in the case of any particular trust, having regard to the circumstances thereof.

(3) For the purpose of ensuring the proper maintenance of accounts of any religious trust, the Commissioner may, after consulting the trustees of the religious trust, appoint a person to keep accounts for the trust.

Provided that no such appointment shall be made in respect of a trust having an annual income of less than twenty-five thousand rupees.

13. Investment of trust money.— (1) Where the whole or any portion of the trust-property consists of money which cannot be applied immediately or at an early date to the purposes of the religious trust or where there is a surplus in the funds of the religious trust after meeting all lawful expenditure in connection with such trust, the trustee shall be bound, subject to any direction contained in the deed of trust, to invest the money or the surplus in the following securities and in no others, namely:—

(a) securities of the Central Government or State Government;

(b) stocks, shares or debentures of companies, the interest or dividend on which has been guaranteed by the Central Government or any State Government; and

(c) debentures or other securities for money issued by or on behalf of any local authority or corporation in exercise of the powers

conferred by any Central Act or any Provincial or State Act:

Provided that the Commissioner may, by general or special order, permit the trustee to invest the money or the surplus in any other manner consistent with the trust deed or purpose of the religious trust.

(2) Nothing in sub-section (1) shall affect any investment made before the commencement of this Act.

14. Audit of accounts.— (1) The accounts of every religious trust having an annual income of not less than five thousand rupees shall be audited annually by an auditor to be appointed by the Commissioner, after consultation with the trustees, from among such chartered accountants within the meaning of the Chartered Accountants Act, 1949, as have been approved in this behalf by the State Government.

(2) The auditor shall have access to the accounts, books, vouchers, documents and other records relating to such trust in the possession or control of the trustee and may, by written notice, require the attendance before him of any person responsible for the preparation of the accounts to enable him to obtain such information as he may consider necessary for the proper conduct of the audit.

(3) The auditor shall in his report specify all cases of irregular, illegal or improper expenditure or failure or omission to recover moneys or other property belonging to the religious trust or of loss or waste of money or other property thereof and state whether such expenditure, failure, omission, loss or waste was caused in consequence of a breach of trust or misapplication of trust-property or any other misconduct on the part of the trustee or any other person.

(4) Within a month of the completion of the audit, the auditor shall prepare a report on the accounts audited and shall submit the same to the Commissioner and deliver a copy thereof to the trustee concerned.

(5) The cost of the audit of the accounts shall be borne by the State Government.

15. Inspection and returns.— (1) The Commissioner or any officer authorised by him by a general or special order shall have power -

(a) to enter upon and inspect, or cause to be entered upon and inspected, any trust-property;

(b) to call for or inspect any book, records, correspondence, plans, accounts, or title deed relating to a religious trust in the possession or control of the trustee:

Provided that in entering upon any trust-property as aforesaid, reasonable notice shall be given to the trustee and due regard shall be had to the

religious practices or usages, if any, of the trust.

(2) The trustees of every religious trust shall, within such time or such extended time as may be fixed by the Commissioner, furnish to him such returns, statistics, accounts or other information as the Commissioner may, from time to time, require.

16. Alienation of immovable property.- No transfer by a trustee of any immovable property of a religious trust by way of sale, mortgage, gift or exchange or by way of lease for a term exceeding three years shall be valid, unless it is made with the previous sanction of the Commissioner:

Provided that no such sanction shall be given unless the Commissioner is of opinion that the transfer is necessary or beneficial to the religious trust.

17. Power to determine the object to which trust property shall be applied where the object has ceased to exist or is incapable of achievement.-

(1) Where on an application made in this behalf by two or more persons interested in a religious trust or otherwise, the Commissioner is of opinion that any object of the religious trust has ceased to exist or is incapable of achievement, he may, after issuing notice in the prescribed manner to the trustees of such trust and to such other persons as may appear to him to be interested therein, hold an inquiry into the matter and if after such inquiry, the Commissioner is satisfied that it is necessary so to do, he may, by order direct that the property or income of the trust or so much of the property or income thereof as was previously expended on or applied to that object, shall be applied to any other object which shall be similar or as nearly as practicable similar to the original object.

(2) In making an order under this section in relation to a religious trust, the Commissioner shall have due regard to the original intention of the founder of the trust or the object for which the religious trust was created and the wishes of the trustees or persons interested in the trust and no order shall be made directing the application of the trust-property or any income thereof to any purpose other than a religious purpose recognised by the religion to which the trust belongs.

18. Power of Commissioner to settle schemes for proper administration of religious trusts.- (1) Where on an application made in this behalf by two or more persons interested in a religious trust or otherwise, the Commissioner is of opinion that, in the interest of the proper administration of the religious trust, a scheme should be settled for it, the Commissioner may, after issuing notice in the prescribed manner to the trustee of such trust and to such other persons as may appear to the Commissioner to be

interested therein, hold an inquiry into the matter in the prescribed manner and if, after such inquiry, the Commissioner is satisfied that it is necessary or desirable so to do, he may, by order, settle a scheme for the administration of the religious trust.

(2) The Commissioner may also, in like manner and subject to the like conditions, modify any scheme settled under this section or under any other law or substitute another scheme in its stead.

(3) Every scheme settled, modified or substituted under this section shall be in accordance with the law governing the trust and shall not be contrary to the wishes of the founder of the trust, so far as such wishes can be ascertained.

19. Power of Commissioner when trusts are mismanaged.— (1) Where on receipt of any report of the auditor in respect of a religious trust or on an application made in this behalf by two or more persons interested in the trust or otherwise, the Commissioner has reasons to believe that the affairs of the religious trusts are being mismanaged or that the trustee is neglecting or failing to discharge the obligations imposed on him by the deed of trust, the Commissioner may, after issuing notice in the prescribed manner to the trustee of such trust and to such other persons as may appear to the Commissioner to be interested therein, hold an inquiry into the matter in such manner as may be prescribed.

(2) If after holding such an inquiry, the Commissioner is satisfied —

(a) that the trustee has neglected or failed to discharge the obligations imposed on him by the deed or trust or that the affairs of the religious trusts have not been managed in accordance with the terms of the trust, or have otherwise been mismanaged, or

(b) that any trustee is guilty of misappropriation of trust property,

the Commissioner may, without prejudice to any other action that may be taken against the trustee, make an order giving directions to the trustee for the discharge of the obligations imposed on him by the deed of trust or for the proper management of the trust, or removing the trustee from his office, or directing the trustee to pay to the trust fund such amount not exceeding the amount of loss caused to the trust as the Commissioner thinks fit.

20. Power to remove trustees in certain other circumstances.— Notwithstanding anything contained in the deed of a religious trust, the Commissioner may, after issuing notice in the prescribed manner to the trustee of such trust and holding such inquiry as he thinks fit, by order remove the trustee from his office, if the Commissioner is satisfied that the trustee —

(a) has been convicted more than once of an offence punishable under this Act; or

(b) has been convicted of an offence of criminal breach of trust or any other offence involving moral turpitude.

21. Power to appoint trustee when vacancy occurs.— (1) Where there is a vacancy in the office of trustee of a religious trust and there is no one competent to be appointed as trustee under the terms of the deed of such trust or where there is a bona fide dispute as to the right of any person to act as trustee or where there is a vacancy caused by the removal of the trustee under section 19 or section 20, the Commissioner may, after issuing notice in the prescribed manner to such person as appears to him to be interested in the trust and holding such inquiry as he thinks fit, appoint a new trustee to fill the vacancy, wherever possible, in accordance with the terms of the trust deed or custom or usage relating to such matter.

(2) In appointing a trustee under sub-section (1), the Commissioner shall, as far as possible, select a person of the religious denomination or section to which the trust belongs.

(3) When a trustee has been removed from his office by an order made under section 19 or section 20, the Commissioner may direct the trustee to deliver possession of trust-property to the new trustee or where the new trustee has not been appointed, to any person authorised by the Commissioner in this behalf pending such appointment.

CHAPTER IV

Miscellaneous

22. Procedure and powers at inquiries under the Act.— (1) Subject to any rules that may be made under this Act, every inquiry made thereunder shall be held as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits.

(2) The Commissioner shall, for the purpose of holding an inquiry under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath:

(b) requiring the discovery and production of any document;

(c) the reception of evidence on affidavits;

(d) requisitioning any public record from any court or office;

- (e) issuing any commission for the examination of witnesses;
- (f) any other matter which may be prescribed.

23. Appeals.- An appeal shall lie to the High Court from every order of the Commissioner made under this Act within a period of sixty days from the date of the order:

Provided that the High Court may entertain the appeal after the expiry of the said period, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

24. Trustee to carry out orders of Commissioner and execution of such orders.-

(1) Every trustee shall carry out all directions which may from time to time be issued to him by the Commissioner under any of the provisions of this Act.

(2) An order made under this Act shall, on an application made in this behalf by the Commissioner, be enforced by a civil court having local jurisdiction in the same manner as a decree of such court.

25. Offences and penalties.- (1) If any person -

(a) fails to apply for the registration of a religious trust within the time specified in sub-section (6) of section 6: or

(b) furnishes or causes to be furnished to the Commissioner any return statistics, accounts or other information which he knows, or has reasons to believe, to be false; or

(c) obstructs the Commissioner or any officer in the exercise of his power under clause (a) or clause (b) of sub-section (1) of section 15:

he shall be punishable with fine which may extend to one thousand rupees.

(2) No court shall take cognizance of an offence punishable under sub-section (1) except upon a complaint in writing made to the Commissioner.

(3) No court inferior to that of a presidency magistrate or a magistrate of the first class shall try an offence punishable under this Act.

26. Contributions.- (1) For the purpose of defraying the expenses in connection with the administration of this Act, the trustee of every religious trust registered under this Act shall pay annually to the State Government, in such manner and within such time as may be prescribed, such contributions by way of fees, not exceeding three per cent of its gross annual income, as the State Government may, from time to time, determine.

(2) If any amount payable as contribution under sub-section (1) is not paid within the time prescribed, the Commissioner may issue a certificate for the amount due to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue.

27. Furnishing of copies of extracts from register.- (1) The Commissioner may, on an application made to him in this behalf by any person, furnish to the applicant copies of any extract from the register maintained under section 8 on payment of such fee as may be prescribed and subject to such conditions as may, from time to time, be determined by the Commissioner.

(2) Such copies may be certified in the manner provided in section 76 of the Indian Evidence Act, 1872.

28. Finality of orders.- Save as otherwise expressly provided in this Act, every order made by the Commissioner shall be final and shall not be called in question in any suit, application or proceeding.

29. Jurisdiction of civil courts barred in respect of certain matters.-

(1) Notwithstanding anything contained in any other law for the time being in force, no civil court shall entertain any suit or proceedings in so far as it relates to any question or matter which the Commissioner is empowered by this Act to decide.

(2) No civil court shall entertain a suit for the enforcement of a right on behalf of a religious trust unless such trust has been registered under this Act.

(3) The provisions of sub-section (2) shall also apply to a claim of set off or other proceeding to enforce a right on behalf of a religious trust which has not been registered.

30. Notice of certain suits to be given to the Commissioner.- (1) In every suit or proceeding (except in suits instituted by a trustee for the recovery of arrears of rent and proceedings in execution of decrees passed in such suits) in respect of any religious trust or property belonging to such trust, whether instituted by a trustee or by any other person, the court shall issue a notice of the institution thereof to the Commissioner.

(2) The Commissioner may apply to the court in which any such suit or proceeding as is referred to in sub-section (1) is pending, to be added as a party to the suit or proceeding and shall thereupon be added as a party thereto.

(3) If the notice required under sub-section (1) to be issued to the Commissioner in respect of any suit or proceeding is not issued, the decree on order passed in such suit or proceeding shall, if the Commissioner makes an application to the court in this behalf, be set aside.

31. Protection of action taken in good faith.- No suit, prosecution or other legal proceeding shall lie against the State Government or the Commissioner or any deputy or assistant Commissioner or any officer authorised

by the Commissioner in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules or orders made thereunder.

32. Commissioner, etc., to be public servants.- The Commissioner and all deputy Commissioners and assistant Commissioners shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

33. Power to give directions.- The State Government may, from time to time, give to the Commissioner in writing such general or special directions on questions of policy as it thinks fit, and the Commissioner shall, in the performance of his functions under this Act, comply with such directions.

34. Act not to apply to certain classes of trusts.- The provisions of this Act shall not apply to -

(a) any Sikh Gurdwara to which the Sikh Gurdwaras Act, 1925, applies; or

(b) the Durgah Khawaja Saheb, Ajmer, to which the Durgah Khawaja Saheb Act, 1955, applies or to any other wakf as defined in the Wakf Act, 1954, or in any Provincial or State Act relating to wakfs in any State; or

(c) any religious trust existing or created for the benefit of Christians, Jews or Parsis or any section thereof.

35. Power to exempt.- The State Government may, by notification in the Official Gazette, exempt any religious trust or class of religious trusts to which any special enactment applies from the operation of all or any of the provisions of this Act.

36. Power to make rules.- (1) The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act:

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the functions of, the procedure to be followed by, the number and terms of office of, and the manner of filling casual vacancies among, the members of the Advisory Board;

(b) the form and manner of making application for the registration of religious trust and the particulars it may contain;

(c) service of notice and orders under this Act;

(d) the procedure to be followed by the Commissioner in holding any inquiry under this Act and the powers of a civil court which may be vested in the Commissioner;

(e) the levy and collection of fees in respect of any application

under this Act for registration of religious trusts and supply of copies of extracts from the register maintained under section 8;

(f) the form of the register of religious trusts maintained under section 8 and particulars it may contain;

(g) the form in which and the time within which the budget in respect of a religious trust may be prepared;

(h) the form and manner in which accounts of a religious trust may be maintained and the particulars it may contain;

(i) the time at which and the manner in which the accounts of a religious trust may be audited;

(j) the form and manner in which any report, return, statistics or other information may be furnished to the Commissioner by any trustee under this Act;

(k) the manner in which, and the time within which, contribution is to be paid by the trustee of a religious trust;

(l) the form and manner in which copies of extracts from the register of religious trusts may be furnished;

(m) any other matter which is to be, or may be, prescribed.

37. Repeal.- The following enactments, namely:-

(i) The Religious Endowments Act, 1863 (XX of 1863);

(ii) The Charitable Endowments Act, 1890 (VI of 1890);

(iii) The Charitable and Religious Trusts Act, 1920 (XIV of 1920);

(iv) Section 92 of the Code of Civil Procedure, 1908;

shall not apply to any religious trust to which this Act applies.

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GLOSSARY OF SANSKRIT TERMS

<u>ā-gama</u>	a sacred work
<u>āśrama</u>	stage, stage of life, status
<u>devatā</u>	godhead, deity
<u>dharma</u>	righteousness, duty
<u>dharmaśāstra</u>	science of dharma
<u>isṭa</u>	regarded as good
<u>karma</u>	action or ritual
<u>matha</u> (mutt)	seminary, orthodox college
<u>mīmāṃsā</u>	One of the three great divisions of orthodox Hindu philosophy (divided into two systems viz. <u>pūrva-mīmāṃsā</u> or <u>karma-mīmāṃsā</u> and the <u>uttara-mīmāṃsā</u> . <u>Mīmāṃsā</u> means interpreting religious injunctions.
<u>mīmāṃsākara</u>	a scholar of the <u>mīmāṃsā</u> philosophy
<u>nibandha</u>	corrody, pension, stipend
<u>pūjārī</u>	a priest
<u>punya</u>	religious merit
<u>pūrtā</u>	an act of pious liberality (such as feeding a Brahmin, digging a well, etc.)
<u>samādhi</u>	a tomb (generally of a saint)
<u>samarpana</u>	offerings, giving away
<u>saṅgha</u>	community
<u>sapinda</u>	close relation, within seven degrees on the father's side or five on the mother's
<u>sanyāsi</u>	ascetic, one who has renounced the world
<u>śāstra</u>	a law book or whole body of written laws
<u>śāstrī</u>	a scholar or professor of the <u>śāstra</u>
<u>smṛti</u>	recollection, verse or treatise of traditional learning
<u>smṛtīa</u>	scholar in <u>smṛti</u>
<u>vedāṅga</u>	certain works regarded as auxiliary to and even in some sense part of the Veda